THE LEGAL STATUS OF THE COMMON LAW TRUST

A Thesis Presented for the Degree

of

Master of Business Administration

By

Jane Berriman, B.B.A., LL.B.

CONTENTS

"I thank my fortune for it,
My ventures are not in one bottom trusted,
Nor to one place; nor is my whole estate
Upon the fortune of this present year."
Merchant of Venice
Act I, Scene I

"Put not your trust in money, but put your money in trust."
Oliver Wendell Holmes

PREFACE

When I was a student in law school, I became interested in the business organization known as a Massachusetts Trust. The name in itself proclaimed it to be the product of the legal minds of Massachusetts, but the text books failed to mention it, and the law dictionaries ignored the Massachusetts trust altogether. Other courses intervened, and the subject was added to that discouraging long list kept by every law student which bears the caption, "To Be Read Later."

During a summer course at Boston University a whole chapter in our text, "Financial Organization and Management," [1] was devoted to a business organization known as a Massachusetts Trust. The laws governing the more usual forms of organization, the single proprietorship, the partnership, and the corporation, were familiar; all built upon common law and statutory regulations, based upon the individual right of contract, with subsequent right of appeal to our courts of law for damages in case of breach. These business organizations I had studied in law school, but the Massachusetts Trust was familiar to me in name only. I eventually learned that this type of organization bases its form not upon statutory regulations, but upon the common law affecting trusts, a branch of law within the confines of equity jurisprudence.

This has resulted in an organization with the advantages and privileges of a corporation, but with the common law liabilities

---

I. Gerstenberg, C. W. p. 56-71.

of a partnership. Because of this dual personality, the Massachusetts Trust remained vague and incomprehensible, until the research necessary for this thesis, both historically and in the field, brought forth the results found in the following pages.

Much has been written about the management of trusts, especially in the investment field, but very little about the advantages of the different types of organization. The laws governing a partnership can be found in our Uniform Partnership Act, [1] those governing the corporation, in our General Laws, [2] but the laws governing Massachusetts Trusts have not been codified.

Looking back over the history of our codified laws, we note the agitation which brought them forth. The question then arises as to the duration of the common law trust without statutory regulation. Realizing that law follows public opinion, but follows very slowly, the legal profession may well ask what must the layman know about the present status of these trusts before demanding regulatory measures.

This thesis deals exclusively with this phase: the present legal status of the so-called Massachusetts Trust. The information contained herein has been obtained from every available source; from business men in the field who are regarded as authorities by the legal profession, and from attorneys who are known as consultants to trusts. Most of the material, however, has been obtained from decisions rendered by our own Massachusetts courts, and by the Supreme Court of the United States.

---

1. General Laws of Massachusetts, Chapter 108
2. Ibid., Chapters 155, 156, 157, and 158.

The author hesitates to present these findings upon a subject that many of our best legal minds disclaim any knowledge of. The only justification is that the facts found in the following pages give only an inkling of the amount of research I have covered in the past two years and the amount of legal understanding resulting therefrom. I have, however, a very thorough comprehension of the immense amount of research still to be done in the years to come.

The author wishes to thank Professor Robert E. Ireton, co-author of the Federal Reserve Act, for the use of the material he had collected on this subject, and for his friendly advice and encouragement in preparing this thesis.

INTRODUCTION

The year 1929 marked the end of the development stage in the history of the American Investment Trust. In the United States in June 1928, there were 185 companies of all types, while in June 1931 there were 648 with an investment of well over $3,000,000,000.[1] In Massachusetts alone during the year ending November 30, 1931, 94 such voluntary associations nad registered with the Department of Corporations and Taxation.[2] These figures indicate a revival of interest among business men in unincorporated associations, showing a decided preference toward the Massachusetts trust.

The word "trust" in connection with a profit-sharing association is a comparatively new use of the word in the investment field in this country, although investment trusts have been familiar to European investors since 1865. In Massachusetts these trusts were organized as corporations,[3] voluntary associations,[4] or common law trusts.[5] The legal status of the corporation can be determined from our General Laws, Chapter 156, and by the decisions of our Massachusetts courts, for our judges have rendered decisions upon questions involving the interpretation of almost every paragraph.

---

1. Keane's Manual of Investment Trusts p. XII of the Preface
   Figures not available for 1932.
2. Report of the Commissioner of Corporations and Taxation, p. 139
3. Examples: Lee, Higginson & Co., Stone Webster, & Blodget
4. Examples: Shawmut Association, The Commercial Investment Trust
5. Examples: Harris, Forbes & Co., Old Colony Trust Co.,
   Shawmut Bank Investment Trust

The laws governing a Massachusetts trust can not be found in the statute books, as it is a common law trust and part of our heritage from Great Britain. These laws have not been codified, yet the legal problems involved in this particular form of organization is of especial interest to our Massachusetts legislators, for able financiers prophesy that the time is not far distant when state regulation will be necessary to protect the funds of an ever-increasing number of depositors.

The present law regulating these so-called Massachusetts trusts is of two kinds: common law, when the court decides that the organization is a common law trust; and statute law, Uniform Partnership Act, when the court determines that the organization is a partnership.

The rank and file of investors are not familiar with the trust known to the legal profession as a Massachusetts trust. In fact, the word, "trust," connotes such a diversity of meaning that a brief discussion of its various uses is necessary at this point.

ANALYSIS OF TRUSTS

Definition. A trust is a legal relation existing between two or more persons such that a court of equity will compel one to hold property, or an interest in property, of which he has the legal title for the benefit of the other. The person so holding this legal interest in property is called the trustee, and the person entitled to the benefit, or the equitable interest in the property, is known as the beneficiary of the trust, or the cestui que trust.[1]

Webster's definition of a trust is a confidence reposed in one person, called the trustee, for the benefit of another, called the cestui que trust. A trustee is a person who takes and holds the legal title to the trust property for the benefit of another. The cestui que trust or beneficiary is the one who has a right to a beneficial interest in and out of an estate, the legal title to which is vested in another as trustee.

The definition most often quoted by the legal profession is that of our own Mr. Justice Story in his Commentaries on Equity Jurisprudence. "A trust is a beneficial interest in, or a beneficial ownership of, real or personal property, distinct from the legal ownership thereof."[2]

All these definitions emphasize the idea of the legal title in one person and the equitable title in another. In

---

1. Cochran, W.C. "Law Lexicon," p. 468
2. p. 81

ANALYSIS OF TRUSTS

<u>Definition</u>. A trust is a legal relation existing between two or more persons such that a court of equity will compel one to hold property, or an interest in property, of which he has the legal title for the benefit of the other. The person so holding this legal interest in property is called the trustee, and the person entitled to the benefit, or the equitable interest in the property, is known as the beneficiary of the trust, or the cestui que trust.[1]

Webster's definition of a trust is a confidence reposed in one person, called the trustee, for the benefit of another, called the cestui que trust. A trustee is a person who takes and holds the legal title to the trust property for the benefit of another. The cestui que trust or beneficiary is the one who has a right to a beneficial interest in and out of an estate, the legal title to which is vested in another as trustee.

The definition most often quoted by the legal profession is that of our own Mr. Justice Story in his Commentaries on Equity Jurisprudence. "A trust is a beneficial interest in, or a beneficial ownership of, real or personal property, distinct from the legal ownership thereof."[2]

All these definitions emphasize the idea of the legal title in one person and the equitable title in another. In

---

1. Cochran, W.C. "Law Lexicon," p. 268
2. p. 81

order to understand the status of any type of trust, a clear comprehension of the difference between the legal title and an equitable title is necessary.

Meaning of Equitable Title. The term equity has two meanings: one professional, the other popular. When the legal profession speaks of equity, it is thinking merely of that part of the law of England which is derived, not from the custom of the realm nor the enactment of parliament, but from the decisions of the old Court of Chancery. On the other hand, when the man in the street talks of equity, he is thinking of ideal justice which is not regulated by the law and may be even contrary to the law.

The principal concern of equity has been the protection of property rights. As the common law recognizes none but the legal title, he who seeks the aid of a law court must base his demand upon his legal title. But when the legal title to an estate is vested in one person, while the right to its use and enjoyment is in another, an equitable interest is the result, which, though ignored by the common law, can be preserved and protected in equity. This is the basis of our trust law. The trustee has the legal title which is recognized and enforced by the common law; the cestui que trust, the equitable title. Any abuse of trust is within the exclusive jurisdiction of a court of equity; hence the term, "equitable interest."

order to understand the status of any type of trust, a clear comprehension of the difference between the legal title and an equitable title is necessary.

Meaning of Equitable Title. The term equity has two meanings: one professional, the other popular. When the legal profession speaks of equity, it is thinking merely of that part of the law of England which is derived, not from the custom of the realm nor the enactment of parliament, but from the decisions of the old Court of Chancery. On the other hand, when the man in the street talks of equity, he is thinking of ideal justice which is not regulated by the law and may be even contrary to the law.

The principal concern of equity has been the protection of property rights. As the common law recognizes none but the legal title, he who seeks the aid of a law court must base his demand upon his legal title. But when the legal title to an estate is vested in one person, while the right to its use and enjoyment is in another, an equitable interest is the result, which, though ignored by the common law, can be preserved and protected in equity. This is the basis of our trust law. The trustee has the legal title which is recognized and enforced by the common law; the cestui que trust, the equitable title. Any abuse of trust is within the exclusive jurisdiction of a court of equity; hence the term, "equitable interest."

History of the Equity Court. This system of law known as equitable jurisprudence had its beginning as a separate court during the reign of Edward III, 1312-1377. Even at that time the common law was inflexible; precedents established by decisions of judges came to be considered binding upon succeeding judges. These courts were not willing to provide a remedy for every wrong. If a precedent could not be found among those formerly granted on facts similar to those of the case brought by the plaintiff, he had no action. Therefore the King appointed his Chancellor to hear such cases, and to render decisions according to equity and good conscience. These decisions the courts could not ignore, as it was the King's prerogative to administer justice independently of the courts. The Chancellor and his assistant became known as the Court of Chancery, Keeper of the King's Conscience. As they were priests, not lawyers, no attention was paid to precedents; for "the king's bench is a court of law, but the court of chancery is a court of conscience."[1]

Soon this Court of Chancery acquired exclusive jurisdiction over cases when there were no forms of action by which relief could be obtained at law. Trusts were the most conspicuous example; for they are wholly without cognizance at common law, and the abuses of such trusts are beyond the reach of legal process. However, they are cognizable in courts of equity, formerly courts of chancery, and an ample remedy is tnere given in favor of the cestui que trustent for all wrongs and injuries whether arising from negligence or positive misconduct.

---

[1] Cochran, W.C. "Law Lexicon," p. 295

Place in American Jurisprudence. This was the law of England on July 4, 1776, and is of the utmost importance to students of equity jurisprudence today, for our own state constitution following the English law states: "All the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the court of law, shall still remain and be in full force, until altered or repealed by the legislature, such parts only excepted as are repugnant to the right and liberties contained in the constitution."[1]

One of the rules of the Supreme Court, made under the authority of an act of Congress, is that, when not otherwise directed, the practice in the high court of chancery in England shall be followed.[2]

Our Federal Constitution provides that the judicial power of the United States "shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority."[3]

Therefore there can be no question regarding the jurisdiction of the equity court over these so-called Massachusetts trusts, and it is to the decisions of these courts that we must look to determine their legal status.

---

1. State of Massachusetts, chapter 6, article 6 of the constitution.
2. Bein v. Heath, 12 Howard 168; Penn. v. Bridge Co., 13 Howard 518
3. Article 3, Paragraph 2 of the Federal Constitution.

Kinds of Trusts. The word "trust" is used most commonly in the following connections: trust companies, charitable or public trusts, spendthrift trusts, monopolistic trusts, and business trusts. The Massachusetts trust is an example of a business trust. Space does not permit a legal analysis of each, yet a brief survey of these various types, noting their particular characteristics, is necessary in order to give the Massachusetts trust its proper status in this trust structure.

Trust Companies. These exist in the United States in various forms. They are financial institutions, usually of corporate form, organized to carry on a complete banking service, with a savings department, and a trust department. In their corporate capacity they act as trustee, managing property under the law of trusts. This trusteeship for estates, made by the terms of a will, and known as a testamentary trust, is becoming very popular as persons recognize the superiority of the fiduciary service rendered by a corporate trustee with its fixed responsibilities and its legal continuity. These companies are advertising the advisability of a living or voluntary trust, a trusteeship entered into during the life of an individual under a deed of trust, thus releaving himself of the care of his estate. Through a personal trust department, these trusts act as guardians for minors and for incompetents, caring for securities, collecting incomes, and performing the usual routine duties in this connection. A very special service is rendered to municipal, county, state, and government officials by

acting as trustee and paying agent under bond issues. They may be appointed fiscal agents for corporations to handle the issuance of their bonds and the registration and transfer of stocks.

The relationship which exists between these trustees and their cestuis is a fiduciary one, governed by the equitable law of trusts. They are not organized as common law trusts, however, although all their trustee business is based upon the common law. Their form of organization is a corporation, with its attending rights and liabilities, and should not be confused with the Massachusetts trust, a common law trust, the subject of this thesis.

Charitable or Public Trusts. This is a trust which is for the benefit of an indefinite class of persons, sufficiently designated to indicate the intentions of the donor. The court of equity looks with favor upon gifts for charities, and will endeavor to carry them into effect. Massachusetts is one of the states where the Statute of Charitable Uses is in full force. The law of England upon the subject of gifts to charitable uses as it was administered by the Court of Chancery became American law at the time of the adoption of our constitution, and has continued to be the law of this state.[1] It is interesting to note in this connection that the famous Girard Will Case[2] concluded that the English Statute of Charitable Uses of 1601[3] was but declaratory of the common law

---

1. Perry, J.W. "Trusts and Trustees," paragraph 737
2. 2 Howard 127
3. 43 Elizabeth C4

and that such trusts were valid in the absence of legislation, and upon this has been based our own laws governing charitable trusts. In Jackson v. Phillips, 14 Allen 539, our celebrated charitable trust case, the principles set down during the reign of Queen Elizabeth were reiterated, and the English system of charitable trusts was formally adapted into our system of jurisprudence.

Spendthrift Trusts. This type is a distinct American institution. Its purpose is to provide for the beneficiary against his own improvidence by providing against alienation by anticipation of the trust income. The beneficiary cannot assign his right to receive future income, nor can such income be subjected to the payment of his debts.[1] In England such trusts have been held invalid on the ground that it is against public policy to permit the ownership of property without permitting its alienation, nor burdening it with liability for its owner's debts.[2]

In Broadway National Bank v. Adams, 133 Mass. 170, the court upheld the validity of the spendthrift trust. The theory of the Massachusetts court is that the rule of public policy which subjects one's property to the payment of his debts does not subject the property of the donor to the debts of his beneficiary, and does not give the creditors a right to complain that in the exercise of his absolute right of discretion, the donor has not seen fit to give the property to

---

1. Eaton, W. F. "Eaton on Equity," p. 342
2. Younghusband v. Gisborne, 1 Coll. 400, 63 Eng. Reprint 473
3. Hale v. Bowker, 215 Mass. 354

creditors, but has left it out of their reach.[1] The effect of this decision is to legalize restrictions against the equitable interests in personal property and to forbid such equitable interests to be taken for the debt of the cestui.[2]

The status of this type of trust is determined by the same laws that govern the Massachusetts trust. The mode of its creation is very different; sa spendthrift trust is either a testamentary trust or a living trust, which will be executed by the Probate Court, where no questions arise as to its identity. A Massachusetts trust is defined in its declaration of trust, and that definition helps to determine its legal status.

<u>Monopolistic Trusts.</u> During the 19th century, the Sherman Anti-Trust laws made the word "trust" opprobrious to many. These laws were aimed against organizations, usually corporations, large and powerful enough to exercise monopolistic power over output and prices in the particular industry with which they were connected. The history of these monopolies, especially the East India Company and the Hudson Bay Company, make interesting reading for the student of history, and the law student will be interested in the fact that our statutes have codified the common law, and that an understanding of these statutes depends upon an appreciable knowledge of the common law.[3]

These are trusts, to be sure, business organizations, with trustees and cestuis que trustent; but their status is determined by their charter, as any other corporation. In this investigation

---

1. Hale v. Bowker, 215 Mass. 354
2. Dunn v. Dobson, 198 Mass. 142; Hoffman v. N.E. Trust Co., 187 Mass. 205
3. Taft, W. H. "The Anti-Trust Act and the Supreme Court," p. 20

it has been found that this type of organization is the popular conception of the word "trust," but will concern us here only as members of the trust family.

Business Trusts. The definition of a trust which challenged me to make this investigation was made by Charles W. Gerstenberg: "An investment company is a corporation (frequently a Massachusetts trust) that seeks no control over the companies whose securities it purchases. It undertakes no operating or administrative duties but contents itself with making profitable investments of the moneys received from the sale of its securities."[1]

L. R. Robinson in "Investment Trust Organization and Management" defines an investment trust as "an agency by which the combined funds of different participants are placed in securities showing a distribution of risk such as to introduce the 'law of average' in protection of the principal. Moreover, in aiming solely at the safe and reasonable profitable employment of its subscribed investment funds, the investment trusts definitely avoid any and all of those responsibilities of control, management, finance, direction or special interest which are sometimes tied in with investment."[2]

These two definitions of a business trust are typical of those found in books on financial organizations. They describe quite definitely the purpose of these trusts, but give no hint as to their status, and the legal questions involved in their organization. The ambiguity of the various names is most confusing. A corporation is always a corporation, but a business trust may be

---

1. Gerstenberg, C. W. "Financial Organization and Management," p. 587
2. Robinson, L. R. "Investment Trust Organization and Management," p. 216

a business association formed under a deed of trust, a voluntary association, the common law trust, or a Massachusetts trust.

It has been found that a common law trust is known only in this country. Trusts in Great Britain are organized as corporations, as are many here in Massachusetts, but the type that is being investigated is the so-called Massachusetts trust, a business trust based upon common law principles.

Common Law Trust. During a discussion on this subject with a librarian in the Congressional Library in Washington, he made this remark: "There is no organization known as a Massachusetts trust. That is a name used by the legal profession to designate a common law trust."

The next step in this analysis is to determine just what the words "common law" mean when applied to a trust. The layman goes to the dictionary for his definition.

Webster: "Customs which exists as law in every country though it is known in England as 'the common law' or 'the custom of the realm,' the existence of which is now usually proved by showing that it has been affirmed by the courts, or at least has been appealed to in the writings of great judicial sages."

The law student goes to Blackstone, known to every student as the first professor of law. Sir William Blackstone: "That admirable system of maxims and unwritten customs, which is now known by the name of the common law, as extending its authority universally over all the realm."[1]

---

[1] Blackstone, W. 4 Commentaries 412

Mr. Chancellor Kent, who set himself the task of establishing the common law in America wrote: "Unwritten, or common law includes those principles, usages, and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."[1]

The research student finds that the term came into general use in the reign of Edward I, when it was employed, first by English lawyers to distinguish the general law of the land from local customs, royal prerogatives, and in short from all that was exceptional or special. All expressly enacted laws were excluded from the English lawyers' notion of the common law. It was defined by Lord Wensleydale in Mirehouse v. Mennel, 8 Bing. 515, as "a system which consisted in applying to new combinations of circumstances those rules which we derive from legal principles and judicial precedents."

William Bracton who died in 1268 wrote the first systematic treatise on the laws of England. English lawyers for a century before Bracton's time had been keeping minute records on parchment of all that the courts had done, and from its rolls Bracton cited numerous decisions. He cited them as precedents, paying special heed to the judgments of two judges who were then dead, Martin Pateshull and William Raleigh. Thus at a very early time English "common law" showed a tendency to become what it afterwards definitely did become, namely, "case law." The term "common law"

---

[1] Kent, J. 1 Commentaries 470

was taken over from the canonists by English lawyers, who used it to distinguish the general law of the land from local customs, royal prerogatives, and in short from all that was exceptional or special. Since statutes and ordinances were still rarities, all expressly enacted laws were also excluded from the English lawyers' notion of the common law.[1]

Sir Edward Coke, English barrister, judge and reporter of the first rank, was the greatest common lawyer of all time. His knowledge of the law in days when it was most difficult to come by astonishes common law students today. Coke held that the common law was the very incarnation of human wisdom and that not only was it superior to the king, in that the king had no prerogative but that which the common law allowed him. Magna Carta was regarded as simply a declaration of the common law.

William Blackstone published his Commentaries in 1765. He divided the civil law of England into lex scripta or statute law, and lex no scripta or common law. The latter consists of (1) general customs, which are the common law strictly so called, (2) particular customs prevailing in certain districts, and (3) laws used in particular courts. Common law is not set down in any written statute or ordinance, but depends upon immemorial usage for its support. The validity of these usages is to be determined by the judges. Their judgments are preserved as records, and it is an established rule to abide by former precedents where the same points come again in litigation. Although a statute can,

---

[1] Woodbine, G. E. "Bracton's Note-Book," p. 38

of course, abolish any rule of common law, it can only do so by express words. In the absence of such a manifest intention the common law remains and is the key to unlock the meaning of the statute which will always be construed by the light of it. [1]

The common law has often been described as the natural inheritance or birthright of Englishmen, and is as much a national possession as the English language itself. The Pilgrim Fathers brought it with them to America, even as they brought the English speech, with the result that the common law constitutes the basis of the jurisprudence of the states in the Union, save Louisiana.[2] Most important of the legal institutions which these United States owe to England is this common law stystem of expressing and developing law. The fundamental feature of this system is the general judicial recognition that a decision of a court in one case has a degree of binding force when later a case arises which presents similar facts. The common law is the law developed and expressed by judicial decisions. Thus the common law has flexibility which the law of statutes and codes does not possess; for a common law principle is never absolutely binding upon a court; the power that makes can always modity it, if the strict application of the prior rule to the instant case would in the opinion of the court produce injustice.

In brief, this is our debt to the English common law, its place in our system of jurisprudence, and the respect with which it is held by English and American jurists of note.[3] An interpretation of the Constitution necessitates a knowledge of the

---

1. Summarized from Blackstone's Commentaries.
2. Chilholm v. Georgia, 2 Dallas 419
3. U. S. v. Smith, 5 Wheaton 153

common law; as it is full of such terms as "treason," "trial by jury," "the obligation of contracts," all of which imply as a condition precedent to the constitution the pre-existence of common law.[1]

Mr. Justice Story, one of America's great common law advocates, is responsible for the following: "When John Adams was Vice-President of the United States, Blount's Conspiracy was before the Senate, and this question as to the adoption of the common law was discussed before that body. His opinion, as that of a great lawyer (as he certainly was), and as a great revolutionary patriot was called for on every side. He rose from his chair, and emphatically declared to the whole Senate that if he had ever imagined that the common law had not by the Revolution become the law of the United States under its new government, he never would have drawn his sword in the contest. So dear to him were the privileges which that law recognized and enforced."[2]

And it is these privileges that accrue to any common law trust today. If the courts determine that the legal status of an organization is that of a common law trust, then on questions in dispute it will be governed not by the written laws of the state, but by that body of "principles and maxims brought by our ancestors from England, which must be the rule and guide of judicial decisions to supply the defects of a necessarily imperfect legislation."[3]

---

1. Com. v. Leach, 1 Mass. 59 (See Appendix)
2. Story, J. "Common Law," " "
3. State v. Lafferty, 1 Ohio 364 "

It is immaterial what type of business this trust carries on. This cannot be over-emphasized. The popular use in our newspapers today of the words "investment trust" has led many into the erroneous belief that a trust is usually in the investment business. At the beginning of this investigation, it was sought to determine the status of the Massachusetts investment trust. This was as illogical as it would be to attempt to determine the legal status of the Massachusetts dry goods corporations. The legal status of any corporation, regardless of the type of business it carries on, is determined by the Articles of Corporation, and the adherence or violation thereto by the incorporators. These articles are not left to the will or desire of the incorporators, but are set out very minutely in our General Laws.[1]

No statute law requires any set form for a declaration of trust. The trustees, the cestuis que trust and their attorney draw up an instrument which they declare is to be construed as a common law trust. When some question of law arises, the judge may hold that it is not a trust at all, but a partnership. He is not governed by any statute law, he goes to judicial records and precedents for his opinion.[2]

The advice of a well-known investment trust lawyer was sought and this question put to him: "How does one determine the exact status of a common law trust?" His answer was, "By determining the exact legal status of every other type of organization, and noting the points of difference, determining not only what a

---

1. Massachusetts General Laws, chapters 155-158
2. Commonwealth v. York, 9 Metc. 93 (see Appendix)

common law trust is, but also what it is not."

The next step in this thesis is to analyze briefly the legal status of the types of organizations known in Massachusetts, and to compare them with our subject, the so-called Massachusetts trust.

COMPARISON OF TRUSTS

with

OTHER TYPES OF ORGANIZATIONS

Individual Proprietorship. When a person does nothing about the legal form of organization, he is deemed by the law to have chosen this form of individual proprietorship; wherein the whole income, the exclusive right to control, and the liability for all debts are centered in him, the sole proprietor. This is the simpliest form as it requires no act of incorporation by the owner. He is governed by the law of contracts; his rights are easily determinable from the numerous court decisions touching every conceivable phase of the relationship between the parties to a contract. This single proprietor has one great advantage over the owners of other types of organization; for he can go into any state in the Union and carry on his business protected by the Constitution of the United States, and unhampered by state laws governing partnerships or corporations.[1]

Our concern in this thesis is with the type of organization which may do a trust business. The sole proprietor can not do this, for he cannot be both trustee and cestui. The power he exercises may determine whether the organization is a pure common law trust or a partnership.

---

[1] Article IV, section 2.

The General Partnership. Mr. Chief Justice Story defined a partnership as "a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them in lawful commerce or business, with the understanding that there shall be a commission of the profits thereof between them." [1]

A very simple definition is that a general partnership is composed of several persons to carry on as co-owners a business for profit. Since it is formed by an agreement of the parties, it does not derive its existence from any act of the state. Its powers are broader, for it may do practically all that a private individual can do. It is not a distinct legal entity, as is a corporation.

A partnership is created by contract, either written or oral. As this contract may be either express or implied, it necessarily follows that the contract need not be evidenced by a written statement. If several persons engage to carry on as co-owners a business for profit a general partnership results, even though they neglect to set up in writing articles of co-partnership. If there is a question as to what the agreement is, that is a question of fact for the jury; if a question as to the effect of the agreement, that is a question of law for the court.

One peculiarity of the partnership relation is that each partner is jointly and severally liable for all the debts of the firm. Joint and several liability results from an obligation assumed by several, not only is each liable for his own share, but also each one is individually liable for the whole liability. Persons jointly liable must all be sued together,

---

1. Story, J. "Partnership," p. 37

a discharge of one discharges all, and if one dies the liability rests in the survivors. If persons are severally liable, each for only part of the contract, they must be sued individually, and a discharge to one does not discharge the others.

In Massachusetts any person conducting a business under a name other than his own, whether an individual or a firm, is required to record the true names and addresses with the city or town clerk, unless the firm name contains the true surnames of persons conducting the business. For example, Mr. E. A. Jewell and Mr. A. C. Wilson are partners conducting a business under the firm name of The Spring Garage. They must file their names and addresses with the city clerk, since the name of the firm does not contain their true surnames.[1]

A second characteristic of the partnership relation is that the relationship must be created by contract; there must exist the principle of delectus personarum, or the right of selection. Partnership is a relation of trust and confidence, therefore it can exist only when the parties have voluntarily created this partnership relation. Thus, if a partner assigns his interest to another, or if a person buys the interest of a deceased partner, the buyer in neither case becomes thereby a member of the firm. The buyer acquires merely the right to insist upon an accounting, and to take whatever rights the selling partner would have upon a settlement of the firm affairs. The partnership has been dissolved in the first instance by the mere

---

[1] Massachusetts General Laws, Chapter 110, sections 5 and 6

assignment, and in the second instance, by the death of a partner.

The third pecularity of a partnership relation is that each partner is a general agent of the partnership for the purpose of its business, and the act of every partner, for apparently carrying on in the usual way the business of the partnership, binds the partnership. This is one of the outstanding disadvantages of the partnership relationship. Each is the chosen agent of the other. Therefore contracts made by one partner cannot be repudiated by the other, no matter how unreasonable. Nor can a dissatisfied partner plead, as in agency, that his partner exceeded his authority, for the second party to the contract knows "that the acts of one partner are the acts of the other." [1]

Consequently, the partnership form of organization has these two outstanding disadvantages: (1) the unlimited liability of each partner for all the debts of the firm, and (2) the unavoidable termination of the relationship by the death, insanity or bankruptcy of the individual partners, or by the bankruptcy of the partnership itself. War between the nations of the several partners will also work a dissolution.

In the opinion of the many firms organized today as partnerships, the following advantages far outnumber the disadvantages: (1) delectus personnae, or the choice of a partner, (2) personal contact between partner and client,[2] (3) Uniform Partnership Law,[3] (4) freedom from state

---

[1] Story, J. "Partnership," p. 36

[2] Doctors, lawyers, and dentists are not allowed to form corporations.

[3] Acts 1922, chapter 486, section 1.

interference, (5) freedom from corporate taxation.

This partnership relation is one of the oldest forms of business organization, probably as old as business itself. The same fundamental principles that underlie this relationship today can be found in this partnership agreement made in the fifth century before Christ:

"During the 42nd Year of Nebuchadnezzar, King of Babylon, (604-561 B. C.) two notables were making the following solemn declaration before a priest and a scribe in the presence of seventeen witnesses: 'Erib-Sin and Nur-Shamash formed a partnership. They came to the temple of Shamash to draw up the project. All silver, goods, and slaves, male and female, belonging to them indoors or out of doors, were shared by both together. They realized their project. Silver for silver, even to interest, brother will not dispute with brother."[1]

It is necessary to obtain a clear comprehension of the advantages and disadvantages of this particular form of organization before comparing it with a common law trust. All too often have our courts found a declaration of trust to be a contract of partnership, the very type of organization, with these unavoidable liabilities, the trustees and their beneficiaries had planned to avoid.

---

[1] Johns, C. H. "Babylonian and Assyrian Laws," p. 288

Distinction between a Partnership and a Trust. The most difficult legal problem in ascertaining the status of the trust is to determine the line that divides the partnership from the trust. It was the belief of those who favored the trust organization that their indenture eliminated the objectionable features of a partnership contract, and included the advantages of a corporation. In many cases the Massachusetts courts have found the so-called trusts to be partnerships with the unlimited liability of each partner for the debts of the company.

The use of the words "trusts" or "trustees" is not conclusive that the agreement creates a common law trust, neither is the intention of the parties the determining factor. The relation which the trust deed creates is to be ascertained from the acts of the trustees and cestuis, irrespective of any assertion to the contrary. A trust has some features in common with a contract, but one great difference between them is that a contract can be enforced only by a party or one in a position of a party to it, while a trust can be, and generally is, enforced by one not a party to its creation. A partnership is founded upon a contract between the partners, and the Uniform Partnership Act has stated definitely what the result will be, but the business trust instrument may have provisions included for the elimination of the partnership characteristic, personal liability of its owners, only to be informed by the court that this statement has no effect, and its shareholders are partners governed by the rules of the Act.

The drawing of a trust deed, trust instrument, or indenture is beset with many difficulties. It is conceded that this form of agreement states that the property interest of the parties

is to be represented by transferable certificates held by the persons beneficially interested, with the title to such property vested in the trustees. Such a deed should also contain the statement that the cestuis are at no time to be considered partners, and that creditors are to look to the trust property for the payment of debts.

There are no statute laws directing the requirements of a declaration of trust. This is a personal matter of contract between trustees and cestuis. In this respect this form of organization resembles an ordinary partnership. The lawyer who is to write a declaration is obliged to make a thorough examination of the trust deeds found in litigated cases, and to deduce therefrom the words and phrases of limitation that make a declaration a trust deed and not a partnership contract. The fact that the shares representing ownership are transferable is not conclusive that the organization is a trust. In 1884, Oliver Wendall Holmes, then sitting on the bench of the Supreme Court of Massachusetts, declared in Phillips v. Blatchford,[1] 137 Mass. 510, that it was too late to contend that partnerships with transferable shares were illegal in this Commonwealth.

Judge Morton in Hoadley v. Commissioners of Essex, 105 Mass. 519, reviewed the decisions of previous cases in Massachusetts, and for the first time defined a test for determining the status of these trust organizations. This test has become known as the control test, and refers to the control exercised by the shareholders in the management of the trust.

---

[1] See brief of this case in Appendix

Article IV of this trust deed reads: "The general management of the business in the future shall be vested in an executive committee of not less than three or more than five shareholders, to be chosen by the whole body of shareholders at a meeting called by the trustee for the purpose, and to serve till others should be chosen in their stead; and that a majority of the committee should constitute a quorum, and decide in all matters over which the committee had control."

Article VIII: "In the event of the death, resignation, or disability of the present trustee, a new trustee shall be chosen by the shareholders."

The court decided that these two articles placed the control of the management in the hands of the cestuis, since they had power to choose an executive committee in which they vested the general management, and to elect a new trustee in case of death, resignation, or disability of the present incumbent. This authority made the cestuis the principals, and the trustee, their agent, acting under their direction and control.

There is no case in the Massachusetts reports that overrules this decision in Hoadley v. Commissioners of Essex, 105 Mass. 519. It is followed in Whitman v. Porter, 107 Mass. 522; Phillips v. Blatchford, 137 Mass. 510; Ricker v. American Loan & Trust Company, 140 Mass. 346; and in Williams v. Boston, 208 Mass. 487. In each of these cases it was found that the shareholders stood in the relation of co-proprietors. This right to act as co-owners, or co-proprietors, or partners, is

evidenced by the power to control the operations of the enterprise through their control of the trustees.

The measure of this control is difficult to determine. Frost v. Thompson, 219 Mass. 360, is a case which is frequently quoted. The Buena Vista Fruit Company was a voluntary association created under a declaration of trust. This deed gave the shareholders power to remove the trustees at any time, power to alter, amend, or repeal the by-laws; and power to terminate the trust itself. Mr. Chief Justice Rugg held that these provisions demonstrate that this association is a partnership and not a trust.[1]

When this organization came into court again in Horgan v. Morgan, 233 Mass. 381, the court cited Frost v. Thompson, stating that the organizers voluntarily adopted the partnership form of association, and their rights and obligations as shareholders are those defined by the established rules applicable to ordinary partnerships.[2]

The student of business organizations may well question whether these shareholders did voluntarily adopt the partnership form of association. The author of the trust deed inserted the statement that these shareholders were not partners, and were not to be held to the unlimited liability of partners. But to no avail, for the courts regard the actual control exercised by the shareholders over the management, irrespective of any limitations in the trust deed.

In Dana v. Treasurer & Receiver General, 227 Mass. 562, the court declared that the certificate holders were partners

---

[1] See brief of this case in Appendix.
[2] " " " " " " "

when the declaration of trust empowered them to elect four trustees at each annual meeting to serve for three year terms, and by a two-thirds vote to alter, amend, or terminate the trust at any regular or special meeting.

Judge DeCourcey in Priestley v. Treasurer, 230 Mass. 452, held the Warren Chambers Trust to be a partnership because the shareholders reserved to themselves the following: (1) they were to be associated together, (2) they were to have a fixed annual meeting, and special meetings upon written request, (3) they were empowered to fill any vacancy existing in the number of trustees, (4) they were to have the power to remove any or all of the present trustees and put others in their places, (5) they were to make certain provisions regarding the purchase and sale of real estate, (6) and they were to decide the final disposition of the corpus of the trust.

This decision was quoted in Neville v. Gifford, 242 Mass. 1,[1] there were only two shareholders, who were also the trustees. The trust agreement provided that the shareholders may hold meetings, increase or diminish the number of trustees, remove any trustees except the original two, fill vacancies in the board, modify or alter the trust, and terminate the trust at any time, prior to that limited for its duration. Since the property was to be subject to the control of the certificate holders, the trustees were the managing agents and not the principals, and the relation was that of a partnership, not a trust.

---

1. See brief of this case in Appendix

The court in Howe v. Chmeilinski, 237 Mass. 532,[1] quoted from the decision in Williams v. Milton, 215 Mass. 1,[2] stating the law very clearly. Where persons associated themselves together to carry on business for their mutual profit, they are none the less partners because their shares in the partnership are represented by certificates which are transferable and transmittable, and because as a matter of convenience, if not of necessity in case of transferable and transmittable certificates, the legal title to the partnership property is taken in the name of a third person. The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. But speaking with accuracy he is an agent who for the principal's convenience holds the legal title to the principal's property.

In Flint v. Codman, 247 Mass. 463,[3] this control test was stated in these words: "It is manifest from Article X of the trust deed that the shareholders have the ultimate control of all affairs of the trust. Since the trustees may be removed at any meeting of the shareholders; or the frame of the declaration of trust be altered; or the entire transaction terminated, and its affairs liquidated; the trustees are subject to the shareholders, and any suit brought by shareholders will be settled upon the principles governing partnerships in this Commonwealth."

The Supreme Court of the United States affirmed this Massachusetts test in Hecht v. Malley, 265 U. S. 144:[4] "Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge.

1, 2, 3, and 4. See briefs of these cases in Appendix

If they are the principals, and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals, and the trustees are merely their managing agents, a partnership relation between the certificate holders is created."

In Crocker v. Malley, 249 U. S. 223,[1] the Supreme Court expressed the law in one sentence thus: "The cestuis are admitted not to be partners in any sense, when they have no joint action or interest and no control over the fund."

The distinction between the common law trust and the partnership is based upon this Massachusetts rule of control over the management of the affairs of the organization. The legal status of this type of organization is determined by the courts upon the control exercised, not upon the wording of the trust deed, which in every case limits the liability of the cestuis. These words of limitation are mere surplusage, if the court finds that the cestuis have actually exercised the rights of partners. This is unquestionably the law today, and should be thoroughly understood by both the trustees and the cestuis.

Association. A common law trust is sometimes known as a voluntary association or a business association.

General Laws of Massachusetts, Chapter 182, section 1 defines an association as "a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates

---

[1] See brief of this case in Appendix

of participation or shares," and in the same section gives exactly the same definition for a trust, "the word 'trust' shall mean a trust operating under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares, other than a trust established for the sole purpose of exercising the voting rights pertaining to corporate stock or other securities in accordance with the terms of a written instrument."

An association was defined by Mr. Justice Sanford of the United States Supreme Court in the opinion delivered in Hecht v. Malley, 265 U. S. 144,[1] as "a term used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise. We think that the word 'association' clearly includes 'Massachusetts trusts' such as those herein involved, having quasi-corporate organizations under which they are engaged in carrying on business enterprises."

A trust was called an association but was held not to be a partnership in Cotton States Petroleum Co., v. Button, 230 S. W. 743. The case came to the Supreme Court on a question of venue. This was determinable upon whether the individual defendants were jointly liable upon the obligation of the company herein sued upon. The theory of appellee is that the association constituted a partnership rendering all the partners liable upon the obligation of the company. The declaration of trust read: "The said trustees shall hold all of the funds and property, real and personal (hereinafter called the trust fund) now or hereafter

---

[1] See brief of this case in Appendix

held by, or paid to, or transferred or conveyed to them, or their successors, or trustees, hereunder in trust for the purpose with the powers and subject to the limitation hereinafter declared for the benefit of the cestuis que trustent and it is hereby expressly declared that a trust and not a partnership is hereby created that neither the trustees nor the cestuis que trustent, shall ever be personally liable hereunder as partners or otherwise but that for all the debts the trustees shall be liable as such to the extent of trust funds only."

The court stated that there was nothing upon the face of the declaration to show that a partnership exists between the trustees and the beneficiaries. It may be that extraneous evidence might be adduced which would show a partnership relation and liability, but there is nothing in this record bearing upon the question except the declaration of trust, and this upon its face is insufficient for that purpose.

In Hemphill v. Orloff, 277 U. S. 548,[1] the Supreme Court quoted the Massachusetts decisions and held: "The Commercial Investment Trust is of the class commonly known as 'Massachusetts trust' or 'common law trusts.' The Massachusetts courts give effect to agreements like the one here described, recognize the entity of associations organized thereunder, and hold both trustees and shareholders exempt from personal liability."

Judge Morton reviewed the law in The Associated Trust, 222 F (2d) 1012. The issue before the court was whether the Associated Trust was an unincorporated association within the

---

[1] See brief of this case in Appendix.

meaning of the United States Bankruptcy Law. The opinion is given in full: "The character of the respondent is to be gathered from the trust deed. Under it, the trustee declared that he would take and hold in trust money paid to him by other persons to the amount of One Million Dollars, for which he would issue transferable certificates having a face value of One Hundred Dollars, entitled to interest, and to participate in surplus earnings, and also entitled to borrow from the trust sixty per cent. of the face value of the certificate, and after five years to receive from the trust in cash the face value of the certificates upon the surrender thereof. The trustee is given very broad powers as to the management of the property in which the trust funds are invested, with the right to determine what part of the income shall be divided and what shall be retained as surplus. He has no power to bind any of the certificate holders; and they have no power to interfere directly in the management of the property, and no title to it. There seems to be nothing in the organization differentiating it under the Massachusetts decisions from what may be called an ordinary trust; that is, the beneficiaries, cestuis, or certificate holders, (whichever they may be called) have no interest in the trust property and no right to joint action for control of it. They are in sbustance like beneficiaries in a trust under a will. There is no organization having a distinct entity apart from the trustees. But the declaration of trust also provides that if the trustee resigns, the certificate holders may, at a meeting called for the purpose, elect a new trustee, that vacancies in the trusteeship may be filled by election by a majority vote of the certificate holders at meetings duly called; that at such meetings a

a majority of the outstanding shares shall constitute a quorum, and that each share shall be entitled to one vote which may be cast by proxy; and that the certificate holders by a three-quarters vote of the outstanding shares may terminate the trust; increase the number of shares and amend the declaration of trust. This absolute power of termination and amendment gives the certificate holders, as it seems to me the ultimate control of the business of the trust whenever they choose to take that power into their hands. They have not yet done so, but the character of the organization is to be gauged rather by the powers of the certificate holders than by the extent to which those powers have as yet been exercised. An unincorporated association seems to me exactly to describe what the respondent is."

Association distinguished from Trust. This distinction was explained in detail by Mr. Chief Justice Rugg in Bouchard v. First People's Trust, 253 Mass. 351.[1] This was the first time the Massachusetts court was ever required to decide this point.

The First People's Trust was a business organization formed under a declaration of trust. The trustees were given broad powers, and were the masters of the corpus of the trust. The deed of trust stated that the cestuis que trust were not partners or associates or in any other relation whatever between themselves with respect to the trust property. The word "association" always implies, as an essential element, that there be some form of organization resembling modes of procedure inherent in incorporated bodies. The shareholders under this declaration are unassociated, while the trustees have no personal or beneficial interest in the trust property. Therefore

---

1. See brief of this case in Appendix

the First People's Trust is a pure trust, and not a voluntary association within the General Laws of Massachusetts.

The decision in the Hecht v. Malley, 265 U. S. 144,[1] has caused much discussion. This case went to the Supreme Court on a question of taxation. The court reviewed the distinction between a Massachusetts trust and a partnership, quoting the Massachusetts decisions. The trusts in question were established by the cestuis as pure trusts, following the Massachusetts rule, that there be no association among the certificate holders and no power to bind the certificate holders personally for the debts of the trust. Yet the Supreme Court held these organizations were "associations" under the federal taxing statute.

To quote from the decision: "The word 'association' appears to be used in its ordinary meaning in the statute. It has been defined as a term used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise. This court believes that the word 'association' as used in the act, clearly includes 'Massachusetts trusts' such as those herein involved, having quasi-corporate organizations under which they are engaged in carrying on business enterprises." No reference was made by the court to the control vested in the beneficiaries, which is one of the tenets of the Massachusetts control test. In fact trusts were declared to be associations independently of the large measure of control exercised by the beneficiaries.

---

[1] See brief of this case in Appendix

This indicates an intention to drop that requirement. Therefore a trust that operates a business enterprise and is a quasi-corporation in form is an association. The character of the trust's activities has supplanted the control test. Prior to this case, the Massachusetts trust was not taxable as a corporation under the federal revenue acts.

District Judge Norton in White, Collector of Internal Revenue v. Hornblower, 21 F. (2d) 82[1] said: "The dictum in the opinion in the Hecht Case is based on the assumption that a strict trust is an association within the meaning of the Massachusetts statutes, and that such a trust is an association taxable under the federal statutes. This is a mistaken assumption." The Costilla Estate Development Company was the organization in question. It came before the court on a taxing statute, whether this Massachusetts trust was subject to the Stamp Act imposed by the Acts of 1918 on the issue of stock by a corporation. The word 'corporation' was defined to include associations. The court held that this Massachusetts trust was not an association, since the beneficiaries had no power to control the acts of the trustees in any way, and there was no association among the cestuis.

In Neal v. United States, 26 F. (2d) 708,[2] District Judge Brewster reiterated the Massachusetts law when he declared: "Not only in the interest of uniformity, but in the belief that the distinction drawn between associations

---

1 and 2. See briefs of these cases in Appendix

and express trusts is sound in principle, I am prepared to concur in the views expressed in Hornblower v. White, 21 F. (2d) 82, and in Bouchard v. First People's Trust, 253 Mass. 351. The government contends that the classificiation must be determined with reference to the purposes of the trust, or the nature and extent of the activities of the trustees carried on in pursuance of those purposes. Neither Hecht v. Malley, 265 U. S. 144 or Burk-Waggoner Association v. Hopkins, 269 U. S. 110, support this contention. In the latter case, Mr. Justice Brandeis points out that the Burk-Waggoner Association is an unincorporated joint-stock association, like those described in Hecht v. Malley, supra, and these trusts were distinguished by Judge Lowell from the trust before the court in the case of Hornblower v. White, supra.

Mr. Justice Brandeis delivered the opinion of the Supreme Court in Burk-Waggoner Oil Association v. Hopkins, supra. He settled in that decision the right of Congress to tax any organization, be it an association or a trust, thus avoiding the discussiòn as to the distinction between a trust and an association. Mr. Justice Brandeis held: "Unincorporated joint stock associations, although technically partnerships, are not in common parlance referred to as such. Nothing in the Constitution precludes Congress from taxing as a corporation an association, which, although unincorporated, transacts its business as if it were incorporated. The powers of Congress to tax associations is not affected by the fact that, under the law of a particular state, the association cannot hold

title to property, or that its shareholders are individually liable for the association's debts, or that it is not recognized as a legal entity. Neither the conception of unincorporated associations prevailing under the local law, nor the relation under that law of the association to its shareholders, nor their relation to each other and to outsiders, is of legal significance as bearing upon the power of Congress to determine how and at what rate the income of the joint enterprise shall be taxed."

In Fisk v. United States, 60 F. (2d) 665,[1] the Massachusetts control test was expressed as based upon (a) the measure of control over the trustees which the shareholders may exercise, and (b) the extent and character of the powers conferred upon the trustees.

The Massachusetts control test was the determining factor in the decision in Willis v. Commissioner of Internal Revenue, 68 F. (2d) 121,[2] where the Commissioner taxed the income of the trust under the claim that the organization was an association. Since the trustees were given broad powers to fill vacancies caused by the retirement of any trustee, to borrow money, to use capital or income in the improvement of the property; in brief, complete control, the organization was a trust, and the income would be taxable.

The decision in the Hecht case is the only one which ignores the Massachusetts control test. The determining test of the right to tax was based upon the type of business the

---

[1] See brief of this case in Appendix.

the trustees carried on; that is, if the organization was a business organization Congress had a right to levy a tax, on the theory that it was a business venture. The Massachusetts distinction between an association and a common law trust was not discussed. There was much dissatisfaction over this decision. Business men and lawyers here in Massachusetts were greatly perturbed, and it was of great significance to them that Mr. Justice Holmes and Mr. Justice Brandeis, both formerly Massachusetts lawyers, took no part in the decision handed down in this Hecht Case. Mr. Justice Brandeis in Burk-Waggoner Oil Association, supra, did not mention the distinction between an association and a common law trust. This demoting of the Massachusetts control test by the Supreme Court led to the passage of the Revenue Act of 1926, Regulation 65, Article 1314, which is quoted here in full:

"Association Distinguished from Trusts. Where trustees merely hold property for the collection of the income and its destribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by Sections 161-170 and by Articles 861-891. If, however, the beneficiaries have positive control over the trust, whether through the right periodically

to elect trustees or otherwise, an association exists within the meaning of Section 701.

Two tests (1) the businesstest, as to whether or not the organization formed to do business in an organized capacity and for the distribution of the profits among the shareholders in proportion to the investment or shares; (2) is for the purpose of distinguishing an association from a trust, and depends upon the question of whether or not the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees, or otherwise."

Thus the Massachusetts control test was incorporated into the federal law. This control test, a judicial yardstick, is a contribution from Massachusetts lawyers to the science of jurisprudence, and it is in appreciation of what these men have done that these common law trusts are known throughout the United States as Massachusetts trusts.

Joint Stock Company. There is another form of business organization, the joint stock company, which is a species of partnership, and is an important member of our Massachusetts family of business organizations.

A joint stock company is an association of individuals for purposes of profit, possessing a common capital contributed by members composing it, such capital being divided into shares of which each member possesses one or more, and which are transferable by the owner.[1]

---

[1] 38 Corpus Juris 878

It is interesting to note that the term "joint Stock company" has been applied to all business associations with transferable shares, since the famous "South Sea Bubble" in the reign of Queen Anne. In the early Massachusetts statutes a joint stock company was equivalent to a corporation organized under our General Laws,[1] but it did not include those established under special charters. The earliest statute, First Statute, 1851, chapter 133, section 4, under which individuals were authorized to form a corporation without the formality of a special charter, required a certificate to be furnished by a voluntary joint stock company before commencing business, to be filed in the office of the secretary of the Commonwealth before any part of the capital stock was paid.

These facts led to some confusion in reading the early cases. Today corporations are organized under our General Laws. A corporation is an artifical entity brought into existence by the sovereign power of the state, and the individual liability of its members is completely eliminated; unless some part of that liability is expressly preserved by constitutional or statutory provision; while a joint stock company is formed by a written agreement of individuals with each other. Its whole force and effect, in constituting and creating the organization, rest upon the common law right of individuals to contract with each other. The relation they assume is wholly the product of their mutual agreement, and depends in no respect upon any grant of authority from the state. They possess the following characteristics: (1)

---

[1] Attorney General v. Mercantile Co., 121 Mass. 524

they may transact business under an artifical name, (2) the capital and ownership are represented by shares of stock transferable at will, (3) they possess the right of perpetual succession and their existence is not dissolved or affected by death or by transfer of the interest of a member.

A joint stock company has sometimes been confused with a partnership. It is not an ordinary partnership, but is a species of partnership, as the members are partners; therefore the rules of partnership law are applicable, except to the extent where the partners have modified these laws by agreement. Mr. Justice Brandies in Burk-Waggoner Association v. Hopkins, 269 U. S. 110, stated: "Unincorporated joint stock associations, although technically partners, are not in common parlance referred to as such."[1]

Ownership is represented by transferable shares, which eliminates the delectus personarum; the outstanding advantage of a partnership, for a partner cannot force the withdrawal of another partner, nor can he withdraw himself from the firm and substitute another person in his place. His death works a dissolution of the partnership, and unsurmountable disadvantage of the partnership type of organization.

Title to the assets of the business are usually vested in persons who are sometimes called trustees. This fact has lead to the erroneous belief that a common law trust and a joint stock company were the same type of organization. The outstanding characteristic of the joint stock company is that the shareholders may at any time direct and control the actions of the trustees. This determines its legal status; for joint stock companies were recognized by the Massachusetts courts as

---

[1] See brief of this case in Appendix

early as Phillips v. Blatchford, 137 Mass. 510, when Judge Oliver Wendall Holmes said: "It is too late to contend that partnerships with transferable shares are illegal in this Commonwealth."[1]

Partnerships with transferable shares have the advantage of continutiy in the conduct of the business. This corporate advantage is obtained by agreement. The shareholders may agree that the interest of each partner shall be represented exclusively by transferable shares and that no holder of such shares shall have a right to call for a dissolution of the firm. If a partner wishes to retire, he may sell his certificates. Upon his death, there is no liquidation, no momentary interruption in the conduct of the business, for the transferee of his shares becomes a partner. This secures continuity in the conduct of the business.

Distinction between a Joint Stock Company and a Trust. Williams v. Milton, 215 Mass. 1,[2] is the leading case distinguishing a joint stock company from a business trust. The question before the court was whether personal property held by trustees was taxable as trust property or as partnership property. The court recognized that the legislature might provide that trust property which was not partnership property should be treated as partnership property for the purpose of taxation, but after an examination of the statutes, it concluded that it had not done this, and had provided that the taxability of property as trust property or as partnership property should depend upon the real character of the property. The court was of the opinion that if the

---

1 and 2. See briefs of these cases in Appendix

certificate holders are associated together by terms of the trust, and are the principals whose instructions are to be obeyed by their agents who for their convenience hold the legal title to their property, then the property is their property; they are the masters, and it is a real partnership. But if the property is the property of the trustees, and the trustees are the masters, if all that the certificate holders have is a right to have the property managed by the trustees for their benefit, and if they have no right either to manage the property themselves or to instruct the trustees how to manage it, then it is a real trust.

This opinion is often quoted, for it gives a clear summary of what was later called the Massachusetts control test.

In Dunbar v. Broomfield, 247 Mass. 372,[1] all powers are vested exclusively in the trustees, except that confirmatory action by the certificate holders was required for a change in the terms of the trust, and for the appointment of a new trustee. The court declared this organization to be a common law trust.

The Supreme Court of the United States stated the law in Crocker v. Malley, 249 U. S. 223:[2] "Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated

---

1 and 2. See briefs of these cases in Appendix.

together in the control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders is created."

In Priestley v. Treasurer & Receiver General, 230 Mass. 452, only a partial statement of the many powers in the certificate holders is made in the opinion of the court. The record shows that the Warren Chambers declaration of trust provided that at any annual meeting or special meeting of shareholders they may fill any vacancy existing in the number of trustees; they may remove any or all of the trustees and elect others in their places; they may authorize a sale or additional mortgage of the real estate, or any part thereof, held by the trustees; they may authorize or instruct the trustees to purchase and build upon additional real estate and issue additional shares for that purpose and may alter or amend this declaration of trust or substitute a new one in place thereof. These powers of management made this organization a partnership, not a trust.

Mr. Justice Rugg in Flint v. Codman, 247 Mass. 463,[1] held that the declaration of trust gave the shareholders the control of all affairs of the trust, resulting in a partnership type of organization. The deed stated that the trustees were required to call meetings of the shareholders upon request of the holders of one-twentieth of the shares, and, at any meeting of the shareholders they might fill any vacancy existing in the number of trustees, depose any or all of the trustees and elect others in their places, authorize the sale or mortgage of the trust

---

[1] See brief of this case in Appendix.

property, or any part thereof, alter or amend the agreement, or terminate the trust.

In the cases cited the court has applied the Massachusetts control test in determining the legal status of an organization. No distinction was made between an ordinary partnership and a joint stock company. Because a joint stock company is formed under a deed of trust with ownership of shares evidenced by transferable certificates, it has been confused with a common law trust. A Massachusetts trust is not a joint stock company, although there are a few elements which are common to both.

It is usual in a joint stock company, as in a common law trust, to concentrate the power of management in a selected few. This has been clearly expressed in an English case, Burnes v. Ponnell, 2 H. L. Cas. 487, where Lord Campbell said: "A distinction must be made between a member of a common mercantile partnership and a shareholder in a joint stock company. No one will content that a joint stock company would be liable on a bill of exchange, drawn, accepted, or indorsed by any one shareholder. Why? Because it is known that the power of carrying on the business of the company, and of drawing, accepting, and indorsing bills of exchange, is vested exclusively in the directors. This shows that, although a joint stock company is a partnership, it is a partnership of a different description, and attended with different incidents and liabilities from a partnership constituted between persons who carry on business jointly, with equal powers and without transferable shares. All who have dealings with joint stock companies know that the authority to manage the business is property, or any part thereof, alter or amend the agreement, or terminate the trust.

In the cases cited the court has applied the Massachusetts control test in determining the legal status of an organization. No distinction was made between an ordinary partnership and a joint stock company. Because a joint stock company is formed under a deed of trust with ownership of shares evidenced by transferable certificates, it has been confused with a common law trust. A Massachusetts trust is not a joint stock company, although there are a few elements which are common to both.

It is usual in a joint stock company, as in a common law trust, to concentrate the power of management in a selected few. This has been clearly expressed in an English case, Burnes v. Pennell, 2 H. L. Cas. 497, where Lord Campbell said: "A distinction must be made between a member of a common mercantile partnership and a shareholder in a joint stock company. No one will contend that a joint stock company would be liable on a bill of exchange, drawn, accepted, or indorsed by any one shareholder. Why? Because it is known that the power of carrying on the business of the company, and of drawing, accepting, and indorsing bills of exchange, is vested exclusively in the directors. This shows that, although a joint stock company is a partnership, it is a partnership of a different description, and attended with different incidents and liabilities from a partnership constituted between persons who carry on business jointly, with equal powers and without transferable shares. All who have dealings with joint stock companies know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such has power to contract for the company. For this purpose it is wholly immaterial whether the company is incorporated or unincorporated."

This concentration of power of management in a few, who are sometimes called trustees, has led to the erroneous belief that a joint stock company and a trust were one and the same. But a true joint stock company has always had the status of a partnership, while the trust has sometimes had this partnership status thrust upon it.

The elementary rule of partnership is that a partner is liable upon every partnership liability to the last penny of his fortune, unless there has been a lawful agreement with the partnership creditor to the contrary. His own intent is not the deciding point; the court will decide whether he has so conducted himself that a partnership is the result. This rule applies to joint stock companies.

Joseph Story in his text on Partnership, Chapter VII, Paragraph 164, is often quoted: "In joint stock and other large companies, which are not incorporated, but are a simple, although an extensive partnership, their liabilities to third persons are generally governed by the same rules and principles, which regulate common commercial partnerships. In such companies the fundamental articles generally divide the stock into shares, and make them transferable by assignment or delivery; and the whole business is conducted by a select board of trustees or directors. Without undertaking to assert in what conferred upon the directors, and that a shareholder, as such has power to contract for the company. For this purpose it is wholly immaterial whether the company is incorporated or unincorporated."

This concentration of power of management in a few, who are sometimes called trustees, has led to the erroneous belief that a joint stock company and a trust were one and the same. But a true joint stock company has always had the status of a partnership, while the trust has sometimes had this partnership status thrust upon it.

The elementary rule of partnership is that a partner is liable upon every partnership liability to the last penny of his fortune, unless there has been a lawful agreement with the partnership creditor to the contrary. His own intent is not the deciding point; the court will decide whether he has so conducted himself that a partnership is the result. This rule applies to joint stock companies.

Joseph Story in his text on Partnership, Chapter VII. Paragraph 164, is often quoted: "In joint stock and other large companies, which are not incorporated, but are a simple, although an extensive partnership, their liabilities to third persons are generally governed by the same rules and principles, which regulate common commercial partnerships. In such companies the fundamental articles generally divide the stock into shares, and make them transferable by assignment or delivery; and the whole business is conducted by a select board of trustees or directors. Without undertaking to assert in what cases such companies may or may not be deemed illegal, and the members liable to be treated as universally responsible, upon the ground of usurping and attempting to exercise the proper functions of a corporation, which the legislature or government is alone competent to establish; it may well deserve inquiry, how far any stipulation in those articles, and which limit the responsibility of the members to the mere joint funds, or to a qualified extent, will be binding upon their creditors, who have notice of such a stipulation, and contract their debts with reference thereto. This question, many years ago, was presented to the Supreme Court of the United States; but the cause went off without any decision upon the point. Mandeville v. Riggs, 3 Cranch 183.

"It seems to have been thought, that such a stipulation can in no wise operate as a limitation of the general liability of all the partners for all their debts, even though the creditors have full notice thereof. It may, however, be still deemed an open question, whether creditors, with such notice, can proceed against the members upon their general responsibility, as partners, where they have expressly contracted only to look to the social funds; and whether if they have notice of the qualifying stipulation, and contract with reference to it, it may not be easy to assign a reason, why it does not amount to an implied agreement, to be bound by it, as much as if it were expressly agreed to.

"There is certainly nothing illegal in a creditor's agreeing to such a limited responsibility, as a qualification

or condition of his contract; and in many other analogous cases contracts of this sort are deemed perfectly proper, and unexceptionable; as, for example, where a commission merchant agrees to look exclusively to the goods for the reimbursement of his advances; or a mortgagee agrees to look exclusively to the mortgaged property for his debt. But a qualified agreement of this nature must be proved and is never presumed without some reasonable proof thereof."

It is to be concluded, therefore, that the joint stock company is a species of the partnership form of business organization, and should not be confused with the pure Massachusetts trust. The joint stock company has one distinguishing feature, it attempts to limit the liability of its shareholders, who are admittedly partners, by so stating in its articles of agreement. Mr. Story questions the legality of this. No case was found to settle the point, whereas there are numerous cases, supra, where such qualifying statements in trust agreements were of no avail.

There are four Massachusetts cases concerning New York express companies, wherein the court simply stated such organizations were partnerships in Massachusetts, making no mention of the limiting liability clause in the articles of agreement.

In Taft v. Ward, 106 Mass. 518, the Plaintiff, one Taft, contended that the Defendants were suable as partners of the firm known as the New England Express Co., a joint stock association. It was organized in New York under Statute of 1849, c. 258. "Any joint stock company or association consisting of seven or

more shareholders or associates, may sue and be sued in the name of the president or treasurer, for the time being, of such joint stock company." Therefore the Plaintiff could not in this Commonwealth bring an action against the president or secretary, for that is New York law. In Massachusetts such a company is a partnership.

Bodwell v. Eastman & Others, 106 Mass. 525, uterrly disregarded the fact that a joint stock company limits the liability of its shareholders. The Plaintiff brought action against the Defendant and sixteen others as copartners transacting business at Boston under the firm name of the New England Express Co. The court concluded: "The articles of agreement formed a partnership. Therefore the liability of Eastman for the debt of the Plaintiff follows as a conclusion of law. He was responsible for the acts of his partners within the scope of the copartnership business; and they having appointed agents, the partnership and each partner is liable for the acts and contracts within the scope of their employment."

The declaration of trust in Gott v. Dinsomore & Others, 111 Mass. 45, alleged that the Defendants were common carriers, doing business at Boston as a partnership or joint stock association. This Adams Express Company was formed under the laws of the State of New York. The Massachusetts court held that the common law liability of the individual members or stockholders, as partners, remains the same in Massachusetts, regardless of statutory provisions in New York State.

The New England Express Company was sued in Boston & Albany R. R. v. Pearson & Others, 128 Mass. 445, as a partnership, with

the stockholders individually liable for the debts of the organization.

This unavoidable disadvantage inherent in the joint stock company form of business organization is not always thoroughly understood by the shareholder. In comparing this type with our subject, the common law trust, be it a pure Massachusetts trust, can and does avoid this partnership liability by establishing its status through the Massachusetts control test.

This brings the analysis of Massachusetts forms of business organization to a conclusion. The corporation has been purposely omitted, for a common law trust could never be mistaken for a corporation. The status of a corporation is determined by the General Laws of the state of its incorporation, and only that state can question its status after a charter is granted. In answering the inquiry, "What is the legal status of the so-called Massachusetts Trust," I have followed the method of the Massachusetts courts by proving not only what it is but also what it is not. As it was never thought to be a corporation, I have omitted the corporation as a separate topic in this thesis.

Much could be written about the growth of this type of organization, a common law trust which would embody the advantages of the corporate form, and avoid the undesirable liability of a partnership. But I am reminded that these are results of the legal status, and not tests by which that status is determined. The courts have given us a test by which that status can be determined, and the results therefrom must be the subject of further research.

the stockholders individually liable for the debts of the organization.

This unavoidable disadvantage inherent in the joint stock company form of business organization is not always thoroughly understood by the shareholder. In comparing this type with our subject, the common law trust, be it a pure Massachusetts trust, can and does avoid this partnership liability by establishing its status through the Massachusetts control test.

This brings the analysis of Massachusetts forms of business organization to a conclusion. The corporation has been purposely omitted, for a common law trust could never be mistaken for a corporation. The status of a corporation is determined by the general laws of the state of its incorporation, and only that state can question its status after a charter is granted. (In answering the inquiry, "What is the legal status of the so-called Massachusetts Trust," I have followed the method of the Massachusetts courts by proving not only what it is but also what it is not. as it was never thought to be a corporation, I have omitted the corporation as a separate topic in this thesis.

Much could be written about the growth of this type of organization, a common law trust which would embody the advantages of the corporate form, and avoid the undesirable liability of a partnership. But I am reminded that these are results of the legal status, and not tests by which that status is determined. The courts have given us a test by which that status can be determined. and the results therefrom must be the subject of further research.

SUMMARY

Object. The object of this research was to determine the legal status of the so-called Massachusetts trust. What is a legal status? Status means the state, condition or relation of an organization or person to all other organizations or persons found in that particular Commonwealth. The word "legal" is almost superfluous, for the analysis of the status of a business organization would be based upon its legal state, condition, or relation to other business organizations. Hence the necessity of setting up an organization structure and giving the common law trust its rightful place therein. This place is determined by the law.

There are two sources of our laws, the written constitution and the statutes, and the unwritten, or common law. It was found that the General Laws of Massachusetts gave no directions for placing this common law organization in its rightful status among Massachusetts business organizations. Hence, resort must be had to the common law.

The common law gives a history of the trust movement, from its beginnings in Rome to the Statutes of Uses in England. This places the trust in its rightful historical setting, and explains the reason why all trusts come within the jurisdiction of the equity court. This historical background does explain the references in the decisions of the appellate courts, where we must go to find the principles which will determine the legal status of the trust today.

Business men, with the aid and advice of their lawyers, have taken this trust organization and given it a place among

the individual proprietorships, the partnerships, and the corporations, making it serve as a form of business organization with advantages accruing to the organizers which could not be obtained from any other type. Yet they cannot determine its legal status. This is left to the courts, and they will not interfere until after the business is organized and functioning. Then, if a point of law arises, the court will determine the status of the organization. Since there are no written laws in Massachusetts which demand that a trust do thus and so, in order to function as a trust, it is left to the organizers to follow the common law principles of trust organizations.

This is in direct contract to partnerships, and their associates, the associations, and the joint stock companies. The Uniform Partnership Act is a codification of the common law. Legislators have put into written form the rules that govern this type of business organization. However, this act does not determine the partnership status before it begins to function, as the laws governing corporations do. The corporation is a child of the state; it cannot exist without its sanction, but two or three persons may form a partnership, which to all intents and purposes is a partnership, and after such formation the law states what the results will be. It is the same with the common law trust. Its status is determined after its organization, then if it comes before the courts on any question which makes it pertinent to determine whether it is a partnership or a trust, the court will apply the control test and render a decision. Thus it can be said with truth that the courts determine the legal status of a common law trust.

It is only through the study of these decisions that the

rule applied by the courts can be found. There are more such cases to be found in Massachusetts, where the common law trust has been growing more popular every year. Hence, the term used by the lawyers throughout the country, Massachusetts trust. This terminology has led to the misconception that this type of organization was allowed in Massachusetts only. This is at once dispelled when it is understood that this trust is based upon common law principles, and the common law is the rightful heritage of every state in the Union, with the single exception of the state of Louisiana, where such a common law trust as a business organization is unknown.

Then, too, Massachusetts courts have been called upon so often to decide the status of such an organization that they devolved the control test, which is their official yardstick. This has been accepted by the Supreme Court of the United States, during the time when Mr. Chief Justice Oliver Wendall Holmes and Mr. Justice Brandeis, both Massachusetts lawyers, were sitting on the bench. The only dissenting opinion handed down was that in the Crocker case, to which both Mr. Chief Justice Holmes and Mr. Justice Brandeis dissented. Since that decision Congress has included the Massachusetts control test in its Revenue Laws, distinguishing between an association, which is a partnership, and a common law trust. Therefore, it can be said without fear of contradiction that the control test as applied by the Massachusetts courts is the test which determines the legal status of the common law trust.

There are two separate and distinct features of this test, one depending upon the other. If the cestuis have an

association together whereby they may control the affairs of the trust by giving directions to the trustees in any matters whatsoever, the courts of Massachusetts will consider such an organization a partnership. This is because a partnership is an association of two or more persons to carry on a business for profit. It is usual in an ordinary partnership to find the title of the partnership property vested in the names of the partners, for Massachusetts does not consider a partnership a separate entity, although Mr. Justice Brandeis said in his dissenting opinion in Eisner v. Macomber, 252 U. S. 189, "There is much authority for the proposition that, under our law, a partnership or joint stock company is just as distinct and palpable an entity in the idea of law, as distinguished from the individuals composing it, as is a corporation." Massachusetts has not accepted this opinion, however.

Therefore, if the cestuis, who are the owners of the corpus of the trust, are associated together, and through that association control the management of the business, they are partners. This is the only difference between a trust and a joint stock company. Both are organized under a deed of trust, or a declaration of trust, or sometimes merely called an agreement. The ownership is represented by transferable shares, which distinguishes this type of partnership from the ordinary type. Death of a partner works a dissolution, but in a joint stock company where ownership is represented by transferable shares, the affairs of the concern are not interrupted by the death of a shareholder. The deceased partner's share goes to his executor to be later transferred to the rightful heir. In association together whereby they may control the affairs of the trust by giving directions to the trustees in any matters whatsoever, the courts of Massachusetts will consider such an organization a partnership. This is because a partnership is an association of two or more persons to carry on a business for profit. It is usual in an ordinary partnership to find the title of the partnership property vested in the names of the partners, for Massachusetts does not consider a partnership a separate entity, although Mr. Justice Brandeis said in his dissenting opinion in Eisner v. Macomber, 252 U. S. 189, "There is much authority for the proposition that, under our law, a partnership or joint stock company is just as distinct and palpable an entity in the idea of law, as distinguished from the individuals composing it, as is a corporation." Massachusetts has not accepted this opinion, however.

Therefore, if the cestuis, who are the owners of the corpus of the trust, are associated together, and through that association control the management of the business, they are partners. This is the only difference between a trust and a joint stock company. Both are organized under a deed of trust, or a declaration of trust, or sometimes merely called an agreement. The ownership is represented by transferable shares, which distinguishes this type of partnership from the ordinary type. Death of a partner works a dissolution, but in a joint stock company where ownership is represented by transferable shares, the affairs of the concern are not interrupted by the death of a shareholder. The deceased partner's share goes to his executor to be later transferred to the rightful heir. In both these organizations the affairs are administered by a small group, similar to the directors of a corporation, in a common law trust called the trustees, while in the joint stock company they are usually called the managers. In the joint stock company, the shareholders never for one instant give up the management of the business. They are associated together, and are therefore partners, and control the acts of their managers. In a pure trust, this can not be so, for it is the dividing line between a partnership and a trust. The purpose of a trust is to avoid the unlimited liability of partners, and every trust deed states this emphatically. The courts have held this statement not to be sufficient. These words of limitation may express the intention of the trustees and the cestuis,but if the cestuis are not willing to give every vestage of control of the management into the hands of the trustees, and in spite of the language used in the trust deed, exert any of this control through an association among themselves, the Massachusetts courts will hold such an organization to be a partnership.

After reading the cases briefed in the Appendix, it would seem a fairly simple matter to comply with the Massachusetts regulation. This has not proved true, however. The trust deeds that have been scrutinized by the courts have in almost every case been found to be partnerships. It is difficult to find cases that were adjudged pure trusts, bringing us to the conclusion that it is a difficult matter to write and comply with an agreement that will bear the scrutiny of the court.

The Boston Property Trust deed found in the Appendix is quoted as a model. That is a pure common law trust, fulfilling

the requirements of the Massachusetts law. The words of limitation are expressed clearly, and the cestuis did not attempt to control the management. In all probability many such trusts are in existence today; for if the organization functions without dispute, the question as to its legal status never arises. The courts will not interfere with such an organization, they render decisions only upon questions that are brought to them. Usually these questions are upon the interpretation of a taxing statute, where in order to determine the state's authority to tax, the legal status of the organization must be determined first. This is what complicates the whole investigation. The trustee has the legal title to all the trust property, and pays the taxes assessed by the city, state, and federal government that any individual pays. His duty is to so execute the trust that the income is paid to the cestuis according to the terms of the trust deed. The cestuis have a remedy in equity, if the trustee is negligent. The laws that govern a trustee's duty to his cestuis are the same laws that govern any trustee, whether in a testamentary trust which conducts no business, or in a trust that is a business venture.

It is plain that both the cestuis and trustees should thoroughly understand this control test as applied by our Massachusetts courts and the Federal courts before forming such an organization. It is not enough to express an intention in the trust deed, that intention must be rigidly adhered to during the life of the trust.

Value of this Research. Research of any kind brings with it certain definite benefits, which are the results of the work so carried on, irrespective of the subject matter. Research is a concentrated effort to find out everything possible about one particular subject. However, if the mechanics of research were the only benefits, there might be a question as to its ultimate value. On the other hand, data found in such research is of little importance, for a memory knowledge of facts does not add to the sum total of one's education. It is the correlation of these new facts with what one has acquired elsewhere that makes research of this type worthwhile, for one is reminded that a good lawyer does not keep his law in his head, but at hand.

The subject of this research, The Legal Status of the Common Law Trust, was a happy choice. Following the advice of an instructor in law school, I set out to find not only what type of business organization this trust is, but also its points of similarity and difference to the more familiar types of organizations. Herein lies the constructive value of this study.

There are three well known types of business organizations in Massachusetts today, the individual proprietorship, the partnership, and the corporation. They are the best known because when seeking advice about the legal status of these organizations, the lawyers point out the advantages of each. These advantages do not determine the legal status, they are the results thereof. Therefore, any investigation which

determines the legal status of an organization gathers with it the advantages and disadvantages, and gives the investigator a broader comprehension of all existing types of organizations.

The student of business is interested in a comparison of these forms. The individual proprietorship is the oldest and perhaps the most ideal. The responsibility, the decisions which will either result in losses or profits belong to the one individual. He has the satisfaction of creating, and carrying on through his own efforts an organization which is wholly his. The partnership form brings with it advantages and disadvantages, an increase in capital, and a sharing of profits, management, and responsibility. The success of a partnership depends upon the character and ability of the partners, and because so much depends upon personal characteristics of the individuals, this type of organization should be well understood before venturing upon it. The records are full of disasters. It was my privilege to have been consulted by a partnership that had been advised to incorporate. These two partners had been in business very successfully for fifteen years. Neither had any dependents, who would be harmed from an abrupt dissolution of the firm by death, if the firm property had to be sold immediately. They had never had any reason during these years to question each other's integrity and their ideas coincide upon the important issues in the conduct of their business. The title to partnership property is divided between them, and the taxes are paid from firm funds. They have always kept very accurate partnership books. What type of business organization was best for

their particular needs? Since I was questioning everyone I came in contact with about common law trusts, I added this question. I found the comparisons I had made between partnerships and common law trusts had emphasized the advantages and disadvantages to a degree that a disconnected study in law school had not revealed, proving that this research was not merely abstract knowledge. Whereas this is a personal advantage, I believe it would accrue to any student of business who wished to make a comprehensive study of the various types of business organizations which are most popular today.

The outstanding value of this research has been the correlation of the work I had done at Boston University and Portia Law School. I studied accounting for individual proprietorships, partnerships, and corporations at Boston University. At Portia Law School I learned how to form such organizations. Then back at Boston University while studying for a Master's Degree, I learned that there was an organization known as a Massachusetts trust. My law text books dismissed it with the statement that it was neither a partnership nor a corporation, but an organization with the characteristics of each, and standing in the twilight zone between the two. That definition, like so many found in law text books, meant absolutely nothing, until I began this thesis. I was nonplused to find that there was no topic "Massachusetts trust" in the law encyclopaedia, Corpus Juris. Heretofore I started any search from Corpus Juris. Librarians and even some lawyers answered that they had never heard of a Massachusetts trust.

Yet the Department of Corporations and Taxation at the State House was registering the fact that these Massachusetts trusts were being organized in increasing numbers every year. These trusts are known by so many names, the common law trust, unincorporated association, voluntary association, and the so-called Massachusetts trust, that at first it was confusing.

There is very little information to be found outside the case reports on this subject. It is difficult to estimate the value of such reading, for cases contain so much more information than the answer to the question I was searching for. For instance, I have read and briefed many cases on the liability of a trustee, which may be an extension of this work, but does not belong here, for it is not a factor in determining the status of an organization, but the result of that status. Then the subject of taxation, which I also omitted, was the reason in many cases for the court inquiry. Every response to my question, Why did you organize as a Massachusetts Trust instead of a corporation, was, in order to avoid corporate taxation. Many bank affiliates are organized as Massachusetts trusts with the bank itself a corporation. The tendency of the present administration at Washington to look upon bankers as trustees of their depositors' funds, to insist upon a fiduciary relationship, rather than merely a business one, may bring about great changes in our banking structure.

The statement that I knew nothing about common law trusts when I began this study is absolutely true. The word "trust" is used in so many connections that I spent considerable time comparing the common law trust, a business organization, with

Yet the Department of Corporations and Taxation at the State House was registering the fact that these Massachusetts trusts were being organized in increasing numbers every year. These trusts are known by so many names, the common law trust, unincorporated association, voluntary association, and the so-called Massachusetts trust, that at first it was confusing.

There is very little information to be found outside the case reports on this subject. It is difficult to estimate the value of such reading, for cases contain so much more information than the answer to the question I was searching for. For instance, I have read and briefed many cases on the liability of a trustee, which may be an extension of this work, but does not belong here, for it is not a factor in determining the status of an organization, but the result of that status. Then the subject of taxation, which I also omitted, was the reason in many cases for the court inquiry. Every response to my question, "Why did you organize as a Massachusetts Trust instead of a corporation, was, In order to avoid corporate taxation. Many bank affiliates are organized as Massachusetts trusts with the bank itself a corporation. The tendency of the present administration at Washington to look upon bankers as trustees of their depositors' funds, to insist upon a fiduciary relationship, rather than merely a business one, may bring about great changes in our banking structure.

The statement that I knew nothing about common law trusts when I began this study is absolutely true. The word "trust" is used in so many connections that I spent considerable time comparing the common law trust, a business organization, with other trust organizations. The very noticeable change in public opinion regarding the Sherman Anti-Trust Laws is bound to bring results. Then the insurance companies are employing experts on testamentary trusts, and advising their clients to leave their insurance in this form. The spendthrift trust is looked upon with favor in Massachusetts. All this reading brought out the difference between active and passive trusts.

During my four years at Portia Law School we talked a great deal about common law, and I would have defined it quite glibly as unwirtten law; but I have found that expressions in themselves add little to a thorough comprehension of a subject. I read Oliver Wendall Holmes, "History of the Common Law," Roscoe Pound, "Common Law," and everything I had time for from the pen of Joseph Story. This I presume might be termed a history of the law, but this subject was a common law trust, and I had to find out what common law meant, not to merely mouth the expression "unwritten law." The source of all this research has really been the case reports, and they are the common law as the Massachusetts appellate courts are recording it every day.

This brings to a close this thesis. I have attempted to analyse how the legal status of a common law trust is determined by first defining a trust, then by explaining what is meant by a common law trust, and finally by analysing the cases that establish the control test, which has made the Massachusetts Trust an organization known throughout the United States.

BIBLIOGRAPHY

Books

Cochran, W. C. "Law Lexicon." Cincinnati, Ohio: The W. H. Anderson Company, 1926

Dunn, William S. "Corporate Advantages without Incorporation." New York: Baker, Voohis & Co., 1929

Eaton, W. F. "Eaton on Equity." St. Paul, Minn.: West Publishing Co., 1923

Gerstenberg, C. W. "Financial Organization and Management." New York: Prentice-Hall, Inc., 1928

Keane, C. P. "Keane's Manual of Investment Trusts." New York: Keane Investment Publishing Co., 1931

Perry, J. W. "Trusts and Trustees." Boston: Little, Brown & Company, 1929

Robinson, L. R. "Investment Trust Organization and Management." New York: The Ronald Press Co., 1929

Sears, John H. "Trust Estates as Business Companies." New York; Vernon Law Book Company, 1921

Worthington, Sydney, L. "Law of Unincorporated Associations." Boston: Little, Brown & Company, 1916

Statutes

Massachusetts General Laws

Case References

Massachusetts Reports

United States Reports

TABLE OF CASES CITED

(The Figures Refer to Pages)

CASES BRIEFED

Bouchard v. First People's Trust, 253 Mass. 351

Burk-Waggoner Oil Association v. Hopkins, 269 U. S. 109

Com. v. York, 9 Metc. 93

Com. v. Leach, 1 Mass. 59

Chisholm v. Georgia, 2 Dallas 419

Crocker v. Malley, 249 Mass. 223

Eliot v. Freeman, 220 U. S. 178

Fisk v. United States, 60 F. (2d) 665

Flint v. Codman, 247 Mass. 463

Frost v. Thompson, 219 Mass. 360

Gleason v. McKay, 134 Mass. 419

Hemphill v. Orloff, 277 U. S. 548

Hecht v. Malley, 265 U. S. 144

Horgan v. Morgan, 233 Mass. 381

Hornblower v. White, 21 F. (2d) 82

Hussey v. Arnold, 185 Mass. 202

Hoadley v. County Commissioners, 105 Mass. 519

Howe v. Chmielinski, 237 Mass. 532

Mayo v. Moritz, 151 Mass. 481

Neal v. United States, 26 F. (2d) 708

Phillips v. Blatchford, 137 Mass. 510

Williams v. Milton, 215 Mass. 1

Willis v. Commissioner, 58 F. (2d) 121

Trust Deed

The Boston Personal Property Trust

Common Law by Joseph Story

Bouchard v. First People's Trust, 253 Mass. 351 (1925)

The First People's Trust was formed by the execution of a declaration of trust dated October 28, 1919. The declaration was signed by five individuals named therein as trustees and by no others. The number of trustees may be increased or diminished by a majority vote of the trustees in office, but never can exceed fifteen, nor be permanently less than five. The purpose of the trust is "to undertake and carry on anywhere any business, transaction or operation which an individual could legally undertake or carry on conformably to the law of the land where the business transaction or operation is undertaken and carried on."

The trustees are given broad powers to acquire, buy, sell and otherwise deal with property of the trust to the same extent as if they were absolute owners. Vacancies in the trustees arising from any cause are to be filled by a majority vote of the trustees then in office. Any trustee may be removed by unanimous action of all the remaining trustees. The trustees are not entitled as such to share in profits or in distribution of principal, "and shall not be liable for losses and shall not be partners of each other or in association with each other." Certificates are to be issued to shareholders, transferable on the books of trustees when properly indorsed. Owners of shares are called "cestuis que trust or beneficiaries." They are declared to be "trust beneficiaries only and to the extent" defined in the instrument and "not partners or associates or in any other relation whatever between themselves with respect to the trust property." They have no legal interest in the trust assets, have no share in profits as such and are not liable for losses. There is no provision for the holding of any meeting of the shareholders or the performance of any act whatever concerning the management, continuance or termination of the trust or its property or the trustees. Their only legal rights are to receive such dividends as may be declared and to share in any partial or final distribution of the

assets of the trust according to the preferences established with respect to the several classes of stock, all in accordance with the discretion of the trustees. The declaration of trust may be amended by the unanimous action of the trustees by complying with the prescribed forms, one of which is that such amendment shall take effect thirty days after notice in writing shall have been mailed to each shareholder. The shareholders, however, have no power whatever respecting such amendment. They are entitled merely to receive a copy of it. The trust is to end twenty years after the death of described individuals, or earlier upon vote of the trustees.

General Laws of Massachusetts, chapter 182, paragraph 6, states: "An association may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association, in the performance of their respective duties under such written instrument or declaration of trust, and for any damages to persons or property resulting from the negligence of such trustees, agents or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation, and service of process upon one of the trustees shall be sufficient."

Chapter 182, Section 1 of the same General Laws defines an associationn as "a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares."

The precise point to be decided is whether the First People's Trust is an "association" within the meaning of that word in the two sections of the statute. This court (Supreme Judicial Court) has never been required to decide that point. Commonly the inquiry has been to determine whether the particular method of organization or establishment constituted the shareholders partners or pure beneficiaries under a trust.

Bouchard v. First People's Trust, 155 Kan. 253   (continued)

assets of the trust according to the preferences established with respect to the several classes of stock, all in accordance with the discretion of the trustees. The declaration of trust may be amended by the unanimous action of the trustees by complying with the prescribed forms, one of which is that such amendment shall take effect thirty days after notice in writing shall have been mailed to each shareholder. The shareholders, however, have no power whatever respecting such amendment. They are entitled merely to receive a copy of it. The trust is to end twenty years after the death of described individuals, or earlier upon vote of the trustees.

General Laws of Massachusetts, chapter 182, paragraph 6, states: "An association may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association, in the performance of their respective duties under such written instrument or declaration of trust, and for any damages to persons or property resulting from the negligence of such trustees, agents or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation, and service of process upon one of the trustees shall be sufficient."

Chapter 182, section 1 of the same General Laws defines an association as "a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares."

The precise point to be decided is whether the First People's Trust is an "association" within the meaning of that word in the two sections of the statute. This court (Supreme Judicial Court) has never been required to decide that point. Commonly the inquiry has been to determine whether the particular method of organization or establishment constituted the shareholders partners or mere beneficiaries under a trust.

Bouchard v. First People's Trust, 253 Mass. 351 (continued)

All our relevant decisions rendered prior thereto were reviewed with acute thoroughness by Mr. Justice Loring in Williams v. Milton, 215 Mass. 1, and in Dana v. Treasurer & Receiver General, 227 Mass. 562.

There is a sound and well-recognized distinction between a voluntary association and an express trust even though both are established by written instrument or declarations of trust, managed by trustees, and the beneficial interest whereof is divided into shares represented by transferable certificates or shares.

Chief Just Shaw in Lechmere Bank v. Boynton, 11 Cush. 369, said: "An association ex vi termini emplies agreement, compact, union of mind, and purpose, and action."

Chief Justice Holmes in Commonwealth v. Rozen, 176 Mass. 129, stated: "We may extend the word 'association' to include associations without as well as with officers."

In Williams v. Milton, 215 Mass. 1 an express trust with shares was under examination. The deed of trust stated that the certificate holders are in no way associated together, nor is there any provision in the indenture for any meeting to be held by them. The only act which they can do is to consent to an alteration or amendment of the trust, or to a termination of it before the time fixed in the deed. The sole right of the cestui que trust is to have the property administered in their interest by the trustees, who are the masters to receive income while the trust lasts, and their share of the corpus when the trust comes to an end.

The declaration of trust in the case at bar is different from any hitherto considered by this court, in that the shareholders are utterly destitute of every legal right and of every means of expressing an opinion touching the trust. No avenue of action occurs to us as open to them except a court of equity for the enforcement of whatever rights may be cognizable in a court of equity. In this respect it bears resemblance to Mayo v. Moritz, 151 Mass. 481. It is distinguisable from the trusts

involved in Hecht v. Malley, 265 U. S. 144 where reference is made to the large measure of control exercised by the beneficiaries.

The shareholders under this declaration are unassociated. They have no organization, each of them has simply an equitable interest in the trust. The various definitions of the word "association" all imply, if they do not require, as an essential element, that there be some form of organization resembling modes of procedure inherent in incorporated bodies.

The trustees can hardly be termed an association. They have no personal or beneficial interest in the corpus of the trust. To call such trustees an association would involve an extension of the meaning of that word in include persons who act jointly for many purposes quite remote from resemblance to the present trustees.

The result is that the First People's Trust is not an association within the meaning of General Laws, chapter 182, paragraph 6.

Burk-Waggoner Oil Association v. Hopkins, 269 U. S. 109 (1925)

Mr. Justice Brandeis delivered the opinion of the Supreme Court: Unincorporated joint stock associations, althought technically partnerships, are not in common parlance referred to as such.

Nothing in the Constitution precludes Congress from taxing as a corporation an association, which, although unincorporated, transacts its business as if it were incorporated. The powers of Congress so to tax associations is not affected by the fact that, under the law of a particular state, the association cannot hold title to property, or that its shareholders are individually liable for the association's debts, or that it is not recognized as a legal entity. Neither the conception of unincorporated associations prevailing under the local law, nor the relation under that law of the association to its shareholders, nor their relation to each other and to outsiders, is of legal significance as bearing upon the power of Congress to determine how and at what rate the income of the joint enterprise shall be taxed.

Commonwealth v. Leach, 1 Mass. 59

Defendants were indicted in the Court of General Sessions for poisoning a cow, the property of A. B. The defense was that this was a common law offence and that justices of the peace were officers not known to the common law, but were created by statute, and that none of our statutes had given them jurisdiction over the offence charged in the indictment.

In the act for establishing Courts of General Sessions of the Peace, passed July 3, 1782 (Statute 1782, chapter 14) by the first section "they are empowered to hear and determine all matters relative to the conservation of the peace, and the punishment of such offences as are cognizable by them at common law, or by the acts and laws of the legislature, and to give judgment, etc." In this act, the term common law cannot mean the common law of England, because justices of the peace there are not common law officers. It must, therefore, mean our common law; and our common law must be precisely what the statute law of England was at the time of the emigration of our ancestors from that country.

Chisholm v. Georgia, 2 Dallas 419

The Court defined the common law as "a law which I presume is the ground work of the laws in every State in the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it to be in force in each State, as it existed in England at the time of the first settlement of the country."

Commonwealth v. Leach. 1 Mass. 59

Defendants were indicted in the Court of General Sessions for poisoning a cow, the property of A. B. The defense was that this was a common law offence and that justices of the peace were officers not known to the common law, but were created by statute, and that none of our statutes had given them jurisdiction over the offence charged in the indictment.

In the act for establishing Courts of General Sessions of the Peace, passed July 3, 1782 (Statute 1782, chapter 14) in the first section "they are empowered to hear and determine all matters relative to the conservation of the peace, and the punishment of such offences as are cognizable by them at common law, or by the acts and laws of the legislature, and to give judgment, etc." In this act, the term common law cannot mean the common law of England, because justices of the peace there are not common law officers. It must, therefore, mean our common law; and our common law must be precisely what the statute law of England was at the time of the emigration of our ancestors from that country.

Chisholm v. Georgia, 2 Dallas 419

The Court defined the common law as "A law which I presume is the ground work of the laws in every State in the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it to be in force in each State, as it existed in England at the time of the first settlement of the country."

Commonwealth v. York, 9 Metc. 93

The rules and principles of the common law of England have been adopted by this Commonwealth, so far as they are applicable to our condition, and given them an authoritative and binding force and effect. To this great store house of learning and intelligence we must resort, as well for the rules and principles of law, as for the precedents, forms and modes of practice, as they existed at the time of our revolution, and not since otherwise provided for by statute. As this is an unwritten law, we must seek for the evidence of it in judicial records, precedents, and decisions, and those digests, treaties and commentaries, of learned and experienced men, which have acquired respect and confidence by long usage and general consent. If we consult English decisions made since the revolution, it is not because they have any binding force as rules, but because they are expositions of the rules and principles of the common law, by men of great experience and judgment in the knowledge and application of the same laws which we are seeking to expound. And if we read the digests and treatises of reputable authors, published since we ceased to be English subjects it is because they contain the authentic records of the precedents and judicial proceedings, which furnish the evidence of the common law.

* copied verbatim from the opinion of the court.

Crocker v. Malley, 249 Mass. 223 (1919)

This is an action to recover taxes paid under protest to the Collector of Internal Revenue by the Plaintiffs. The taxes were assessed to the Plaintiff as a joint stock company.

The Wachusett Realty Trust was an ordinary real estate trust of the kind familiar in Massachusetts. The certificate holders are in no way associated together, nor is there any provision in the instrument for any meeting to be held by them. Williams v. Milton, 215 Mass. 1.

The trust would not fall under any familiar conception of a joint stock company, whether formed under a statute or not. Eliot v. Freeman, 220 U. S. 178.

The cestuis are admitted not to be partners in any sense, when they have no joint action or interest and no control over the fund.

Trustees and associations acting in a fiduciary capacity have the exemption that individual stockholders have from taxation upon dividends of a corporation that itself pays an income tax, and as the Plaintiffs are trustees, if they are to be subjected to a double liability, the language of the statute must make the intention clear.

Mr. Justice Holmes held: We are of the opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts stock to the extra tax imposed.

Fisk v. United States, 60 F. (2d) 665 (1932)

Action by Fisk and others as trustees of the Main Street Trust to recover income taxes for the year 1927 alleged to have been illegally assessed and collected.

The principle purpose of the Main Street trust was to liquidate the real estate as fast as favorable offers were obtainable. The cash proceeds of all sales were distributed among the beneficiaries as soon as received. None of it was ever re-invested or used in any business for profit.

Under the terms the shareholders had no powers in connection with the trust and no control over the trustees except to approve a trustee nominated by the surviving trustees; to apply to the probate court for the appointment of a new trustee if the remaining trustees failed to fill a vacancy.

The Defendant claims that the Main Street Trust must be an association and taxable under the Revenue Act of 1926.

District Judge Brewster summarized the decisions in other districts: According to it, (Revenue Act), the classification turns (a) upon the measure of control over the trustees which the shareholders may exercise; and (b) upon the extent and character of the powers conferred upon the trustees by the terms of the instrument creating the trust. It is now pretty well settled that the test is not what powers or authority reside in the trustees or the shareholders, but as stated by Judge Anderson in Gardner v. United States, 49 F. (2d) 992, "the crucial test must be found in what the trustees actually do, not in the mere existence of long unused, broad powers.

Therefore, since the Main Street Trust was formed for the sole purpose of liquidating, for distributing among the shareholders, real estate which had been devised to them by an ancestor, the trustees were never engaged in any business for profit. The activities in which the trustees engaged did not constitute the carrying on of business within the meaning of this regulation. Hence, the tax was illegally exacted.

Frost v. Thompson, and others, trustees, 219 Mass. 360 (1914)

Bill in equity filed against the trustees of the Buena Vista Fruit Co. wherein the Plaintiff seeks to recover from the Defendant the balance due on a promissory note signed, "The Buena Vista Fruit Co., G. L. Dunning, Treasurer."

The Buena Vista Fruit Co. is a voluntary association created under a declaration of trust. Article XI reads: All contracts and engagements entered into by the Trustees and all conveyances and instruments executed by said Trustees shall be in their respective names as Trustees, and shall provide against any personal liability on the part of the trustees, and stipulate that no other property shall be answerable than the property in the hands of the Trustees."

Mr. Chief Justice Rugg: A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust, or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created, but if they are subject to the control of the certificate holders, it is a partnership. That was explained at length in Williams v. Milton, 215 Mass. 1.

Tested by these principles, the Buena Vista Fruit Co. is a partnership and not a trust. The declaration of trust provides that the shareholders representing two-thirds in value of outstanding shares have power to remove either or all of the trustees at any time, without assigning any cause, and to appoint others to fill the vacancy; to terminate the trust at any time earlier than that limited for its duration in the declaration of trust, and to terminate it by requiring conveyance of the property to other trustees upon new trusts, or to a corporation. A majority of the

Frost v. Thompson, and others, trustees, 219 Mass. 360 (1914)

Bill in equity filed against the trustees of the Buena Vista Fruit Co. wherein the plaintiff seeks to recover from the defendant the balance due on a promissory note signed, "The Buena Vista Fruit Co., O. L. Dunning, Treasurer."

The Buena Vista Fruit Co. is a voluntary association created under a declaration of trust. Article XI reads; All contracts and engagements entered into by the Trustees and all conveyances and instruments executed by said Trustees shall be in their respective names as Trustees, and shall provide against any personal liability on the part of the trustees, and stipulate that no other property shall be answerable than the property in the hands of the Trustees."

Mr. Chief Justice Rugg; A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust, or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created, but if they are subject to the control of the certificate holders, it is a partnership. That was explained at length in Williams v. Milton, 215 Mass. 1.

Tested by these principles, the Buena Vista Fruit Co. is a partnership and not a trust. The declaration of trust provides that the shareholders representing two-thirds in value of outstanding shares have power to remove either or all of the trustees at any time, without assigning any cause, and to appoint others to fill the vacancy; to terminate the trust at any time earlier than that limited for its duration in the declaration of trust, and to terminate it by requiring conveyance of the property to other trustees upon new trusts, or to a corporation. A majority of the

Frost v. Thompson, 219 Mass. 360 (continued)

shareholders at any time by vote may amend the declaration of trust. The by-laws may be altered, amended, or repealed by vote of the majority of the shareholders at any annual or special meeting of the shareholders.

These provisions demonstrate that this association is a partnership and not a trust.

The note in suit is not the obligation of the trustees executed in accordance with the power conferred in Article XI (supra), but the note of the company executed by its agent. Neither in fact nor in legal contemplation is it the note of the trustees. It follows that the Plaintiff has not brought his case within the principle of law on which his bill is framed and on which he recovered in the Superior Court, viz., that when a trustee has incurred an obligation in conducting the trust, the person to whom that obligation is due can satisfy it out of the trust estate. Hence, the decree in favor of the Plaintiff is wrong, founded as it was upon that principle of law.

Decree reversed.

Hemphill v. Orloff, 277 U. S. 548 (1927)

Plaintiff in error sued Mrs. Orloff, on her promissory note payable to the Commercial Investment Trust, or order, executed at Detroit, Michigan, July 22, 1921. She defended upon the ground, among others, that the payee was a foreign corporation within the meaning of the Michigan statutes; that it had not complied therewith; and, consequently could not maintain the action.

The Commercial Investment Trust is of the class commonly known as "Massachusetts trusts" or "common law trusts."

General Laws of Mass. 1921, Section 2 reads: The trustees of an association shall file a copy of the written instrument or declaration of trust creating it with the commissioner and with the clerk of every town where such association has a usual place of business. The fee for filing said copy with the commissioner shall be fifty dollars.

Section 6: An association may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association, in the performance of their respective duties under such written instruments or declaration of trusts, and for any damages to persons or property resulting from the negligence of such trustees, agents or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation, and service of process upon one of the trustees shall be sufficient.

The Massachusetts courts give effect to agreements like the one here described, recognize the entity of associations organized thereunder, and hold both trustees and shareholders exempt from personal liability. See Hussey v. Arnold, 185 Mass. 202. Williams v. Milton, 215 Mass. 1. Frost v. Thompson, 219 Mass. 360.

Hemphill v. Orloff, 277 U. S. 548 (continued)

Plaintiff, in error, insists that, as construed by the Supreme Court, the statutes of Michigan deny to the trustees, collectively called "Commercial Investment Trust," the benefits of Paragraph 2, Article 4, of the Constitution, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

It is settled doctrine that a corporation organized under the laws of one state may not carry on local business within another without the latter's permission, either express or implied. A corporation is not a mere collection of individuals capable of claiming all benefits assured them by Paragraph 2, Article 4.

Obviously the trust here involved is a creature of local law which demands the privilege of carrying on business in Michigan as an association, an entity, clothed with peculiar rights and privileges under a deed of settlement undertaking to exempt all of the associates from personal liability. As in the case of a corporation and for the same general reasons it cannot rely upon rights guaranteed to the individuals.

Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers of a state concerning it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment.

The commercial investment trust is a business entity possessing the attributes and facilities of a corporation, and the state of Michigan may therefore require that it comply with the laws governing all foreign corporations.

Hecht v. Malley, 265 U. S. 144 (1924)

On writs of certiorari to the United States Circuit Court of Appeals for the First Circuit to review judgments reversing judgments of the District Court of Massachusetts in the Plaintiff's favor in suits to recover taxes alleged to have been illegally exacted.

These four cases, which were heard together, involve the question whether the trustees of three "Massachusetts trusts" are subject to the special excise taxes imposed upon certain associations.

The "Massachusetts trust" is a form of business organization, common in that state, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may, from time to time, be the holders of transferable certificates issued by the trustees, showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation, and are issued and transferred in like manner, entitle the holders to share ratable in the income of the property, and, upon termination of the trust, in the proceeds.

Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals, and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals, and the trustees are merely their managing agents, a partnership relation between the certificate holders is created. Williams v. Milton, 215 Mass. 1; Frost v. Thompson, 219 Mass. 360; Dana v. Treasurer, 227 Mass. 562; Priestley v. Treasurer, 230 Mass. 452.

Hecht v. Malley, 265 U. S. 144 (continued)

The Hecht Real Estate Trust was established by the members of the Hecht family upon real estate in Boston. The trustees have full and complete powers of management, but no power to create any liability against the certificate holders. There are no meetings of certificate holders, but they may, by written instrument, increase the number of trustees, remove a trustee, appoint a new trustee if there be none remaining, modify the declaration of trust in any particular, terminate the trust, or give the trustees any instructions thereunder.

The Haymarket Trust is strictly a business enterprise. The trustees have general and exclusive powers of management, but no power to bind the certificate holders personally. At any annual or special meeting of the certificate holders, they may fill any vacancies in the number of trustees, depose any or all the trustees and elect others in their place, authorize the sale of the property or any part thereof, and alter or amend the agreement of trust.

The Crocker, Burbank & Company is also a business enterprise. It was formerly entitled the Wachusett Realty Trust. The trust instrument was before the court in Crocker v. Malley, 249 U. S. 223. The title to all the present trust property and the right to conduct all the business were vested exclusively in the trustees.

The court concluded that these three trusts were associations. The word "association" appears to be used in its ordinary meaning. It has been defined as a term used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.

This court believes that the word "association," as used in the act, clearly includes "Massachusetts trusts" such as those herein involved, having quasi corporate organizations under which they are engaged in carrying on business enterprises.

Hecht v. Malley, 265 U. S. 144 (continued)

The trustees of Hecht and Haymarket Trusts rely upon the decisions in Crocker v. Malley, 249 U. S. 223, as conclusively determining that they cannot be held to be associations unless the trust agreement vests the shareholders with such control over the trustees as to constitute them more than strict trusts within the Massachusetts rule.

It results from a review of the case that Crocker v. Malley, 249 U. S. 223, is not an authority for the broad proposition that, under an act imposing an excise tax upon the privilege of carrying on a business, a Massachusetts trust engaged in the carrying on of business in a quasi corporate form, in which the trustees have similar or greater powers than the directors in a corporation, is not an association within the meaning of its privisions. The court does not believe that it was intended that such organizations of this character, described as associations by the Massachusetts statutes, and subject to duties and liabilities as such, should be exempt from the excise tax on the privilege of carrying on their business merely because such a slight measure of control may be vested in the beneficiaries that they might be deemed strict trusts within the rule established by the Massachusetts courts.

N. B. Mr. Justice Holmes and Mr. Justice Brandeis took no part in the decision of these cases.

Horgan v. Morgan & Others, 233 Mass. 381 (1919)

Action was brought on twelve promissory notes signed and indorsed, "The Buena Vista Fruit Co., Frank E. Morris, Acting Treasurer." In Frost v. Thompson, 219 Mass. 360, The Buena Vista Fruit Company was decided to be a partnership and not a trust.[1] The organizers voluntarily adopted the partnership form of association, and their rights and obligations as shareholders are those defined by the established rules of law applicable to ordinary partnerships.

The company was bound by acts of the acting treasurer, who was given express authority under the declaration of trust, and by reason of his course of conduct carried on with the knowledge and implied assent of those managing the business of the company, who held him out to the public as having authority to sign and indorse notes in behalf of the company.

Conclusion: The Buena Vista Fruit Company was brought into court on several charges, in several different suits. In Frost v. Thompson, 219 Mass. 360, the legal status of the association was pronounced by the court, and this point was never discussed again. In each of the succeeding cases, it was reiterated that the association was a partnership, reference being made to 219 Mass. 360. At no time did the court again refer to the provisions in the declaration of trust.

Hornblower v. White, 21 F. (2d) 82 (1927)

Suit was brought to recover a tax paid under protest.

The Costilla Estate Development Company was organized to develop, by means of irrigation, a large tract of land in Colorado and New Mexico.

The declaration of trust set forth that three trustees were to hold the property for the purpose of reducing it to cash for division among its owners within the term of twenty years at longest. Vacancies in the office of trustee was to be filled by the remaining trustees. The provisions of the trust might be modified by the trustees if assented to by a majority of the certificate holders.

The Costilla Trust was not a voluntary association under the laws of Massachusetts but an express trust. Bouchard v. First People's Trust, 253 Mass. 351. Its organization was similar to that of the Wachusetts Real Estate Trust involved in the case of Crocker v. Malley, 249 U. S. 223, which seems decisive of the case at bar.

It was contended for the government that under the later case of Hecht v. Malley, 265 U. S. 144, the tax could be sustained. The Hecht Case did not over-rule the Crocker Case, but held that the three Mass. trusts which were there concerned were associations within the definition of the taxing acts. In each of them however, the beneficiaries had the supreme control, as they could remove the trustees. The only power which the beneficiaries in the present case had was to assent to a modification of the declaration of trust, suggested by the trustees.

Since the Costilla Trust was an express trust and not an association, and since it was the opinion of the court that the Crocker Case had not been over-ruled, the present tax is unlawful.

Hussey v. Arnold, 185 Mass. 202 (1904)

The defendants entered into an agreement establishing an association called "The Boston Associates," and appointed three trustees to conduct the business of the association; which was to be the investment, management and use of property in real estate.

The trust agreement had certain provisions. The object was to obtain for the associates most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations.

Article XII of the trust agreement read: All contracts and engagements entered into by the trustees shall be in their names as trustees, and shall provide against any personal liability on the part of the trustees, and stipulate that no other property shall be answerable than the property in the hands of the trustees.

The trustees held the legal title to all the property and they alone could make contracts. Ordinarily trustees bind themselves personally by their contracts with third persons. Actions at law upon such contracts must be brought against them, and judgments run against them personally. This is because the relations of the cestuis que trust to their contracts are only equitable, and do not subject them to proceedings in a court of common law, and the property held in trust is charged with equities which hold it aloof from the jurisdiction of a court of law to take it and apply it in payment of debts created by the trustees. Such debts, if proper charges upon the trust estate, can be paid from it under the authority of a court of equity.

The trustees under the trust agreement were not authorized to contract any debt which should charge the certificate holders. If the trustees contracted in the usual way, without referring to anything which would limit the liability resulting from an ordinary contract, they are personally liable to these petitioners, and judgment can be obtained and enforced

Hussey v. Arnold, 185 Mass. 202 (1904)

The defendants entered into an agreement establishing an association called "The Boston Associates," and appointed three trustees to conduct the business of the association; which was to be the investment, management and use of property in real estate.

The trust agreement had certain provisions. The object was to obtain for the associates most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations.

Article XII of the trust agreement read: All contracts and engagements entered into by the trustees shall be in their names as trustees, and shall provide against any personal liability on the part of the trustees, and stipulate that no other property shall be answerable than the property in the hands of the trustees.

The trustees hold the legal title to all the property and they alone could make contracts. Ordinarily trustees bind themselves personally by their contracts with third persons. Actions at law upon such contracts must be brought against them, and judgments run against them personally. This is because the relations of the cestuis que trust to their contracts are only equitable, and do not subject them to proceedings in a court of common law, and the property held in trust is charged with equities which hold it aloof from the jurisdiction of a court of law to take it and apply it in payment of debts created by the trustees. Such debts, if proper charges upon the trust estate, can be paid from it under the authority of a court of equity.

The trustees under the trust agreement were not authorized to contract any debt which should charge the certificate holders. If the trustees contracted in the usual way, without referring to anything which would limit the liability resulting from an ordinary contract, they are personally liable to these petitioners, and judgment can be obtained and enforced

Hussey v. Arnold, 185 Mass. 202 (continued)

against them individually; but the trust property cannot be held under an attachment nor sold upon an execution for their personal debts. If the trustees were also certificate holders having equitable interests in the property, these are not attachable in an action at law. They are reached only through proceedings in equity.

Therefore the petitioners acquired no lien upon the real estate by their attempted attachment in an action at law.

Hoadley v. County Commissioners of Essex, 105 Mass. 519 (1870)

Hoadley, an inhabitant of Lawrence, filed with the assessors a sworn list of his estate liable to taxation, including therein shares in the McKay Sewing Machine Association, but claiming in reference to them that he was not liable to be taxed. The assessors levied a tax on these shares, which Hoadley paid under protest. Hoadley applied to the assessors for an abatement, which application they dismissed. Thereupon he made application to the County Commissioners.

These shares had been issued by the McKay Sewing Machine Association, an organization known as a trust. One Gordon McKay executed the declaration of trust by which he declared that he held his patents for sewing the soles of boots and shoes to the vamps, his factory where machines were manufactured under these patents and the whole business theretofore carried on by him, in trust for such persons as should buy certificates which were to be issued under that declaration of trust to the amount of fifty thousand in number, the proceeds to be used in carrying on the factory and business assigned to and held by the trustee.

Article IV of the declaration read: The general management of the business in the future shall be vested in an executive committee of not less than three nor more than five shareholders, to be chosen by the whole body of shareholders at a meeting called by the trustee for the purpose, and to serve till others should be chosen in their stead; and that a majority of the committee should constitute a quorum, and decide in all matters over which the committee had control.

Article VIII: In the event of the death, resignation, or disability of McKay, a new trustee shall be chosen by the shareholders.

Judge Morton held: This is a voluntary association of individuals, and its articles of agreement, although they adopt some of the forms of managing the business usual in corporations, constitute a copartnership.

It cannot sue and be sued as a corporation; its members are individually liable for its debts; and it has none of the special attributes which belong to a corporation duly organized under our laws.

Being a copartnership, the laws applicable to that relation must govern its rights and liabilities; and it follows that the personal property held by it was properly taxed in Boston where its business is carried on, and not in Lawrence. Therefore the tax assessed by the city of Lawrence upon Hoadley is illegal.

Conclusion: Article IV of the declaration of trust states that the management of the business was in the control of the shareholders. Article VIII gave the shareholders power to elect a new trustee. These two provisions made this organization a copartnership, notwithstanding provisions in the trust deed to the contrary. The chief distinction between a business trust and a partnership is that the shareholders as beneficiaries cannot control the management of the business, and if the power to manage the business is vested in the shareholders or if they are permitted to appoint and remove trustees at will, the courts treat the organization as a partnership.

Howe v. Chmielinski & Others, 237 Mass 532

The Plaintiff and his associate shareholders under the terms of an agreement in writing created a building trust with transferable shares. It was provided that the trustees should hold the legal title to the trust property, and that vacancies in their number should be filled by three-fourths in value of the shareholders, who also were empowered to depose and elect other trustees in their place, and to change, alter or terminate the trust and direct the sale of the trust property. The proceeds of such sale were to be distributed among the shareholders in proportion to their respective interests in the trust, and upon such termination the trustees were to be discharged from further liability.

It is contended that, while the Plaintiff and his associate shareholders under the above stated provisions of the trust agreement may have been partners as to third persons, they did not as between themselves sustain this relation, and that in the transactions relating to the sale of the property as disclosed by the record, the Plaintiff was free to enrich himself at their expense. The court quoted from Williams v. Milton, 215 Mass. 1: Where persons associated themselves together to carry on business for their mutual profit, they are none the less partners because their shares in the partnership are represented by certificates which are transferable and transmittable, and because as a matter of convenience (if not of necessity in case of transferable and transmittable certificates) the legal title to the partnership property is taken in the name of a third person. The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. But speaking with accuracy he is an agent who for the principal's convenience holds the legal title to the principal's property.

Since the trustees were managing agents subject to the control of the shareholders, the judge ruled that instead of a pure trust a partnership existed for the purpose of carrying on business for their mutual benefit , although the legal title to the property stood in the name of the trustees.

Eliot v. Freeman, 220 U. S. 178 (1911)

The question is raised as to the right to lay a tax upon a certain trust formed for the purpose of purchasing, improving, holding and selling lands and buildings in Boston, known as The Cushing Real Estate Trust.

The trustees had the management of the property with absolute control and authority over the same. The shareholders are to be paid dividends from the net income of the property, and twenty years after the termination of lives in being, the property is to be sold and proceeds divided among the cestuis.

Under the Massachusetts law the respondents are merely trustees. Mayo v. Moritz, 151 Mass. 481; Howe v. Morse, 174 Mass. 491. The trust is not an association organized under the laws of any state or country.

Statutory joint-stock companies are not known in Massachusetts. No tax is laid upon these trusts, common law trusts, except the ordinary tax upon the property. This property is taxed to the trustees like the property of any other trust. The beneficiaries have a purely equitable interest in the property and no tax is laid upon their interest. Hussey v. Arnold, 185 Mass. 202.

The court said in this opinion: We are of the opinion that Congress intended to embrace within this tax only such corporations and joint-stock associations as are organized under some statute, or derive from that source some quality or benefit, not existing at the common law.

Therefore, since The Cushing Real Estate Trust is a pure trust, known as a Massachusetts trust, it is not within the terms of this act.

Flint v. Codman, 247 Mass. 463 (1924)

Suit in equity brought by the minority shareholders in Lovejoy's Wharf Trust seeking to enjoin a sale of the corpus of the trust by the trustees, who are the individual defendants.

Article X of the trust deed reads: The trustees may call meetings of the shareholders at any time, and shall do so upon written request of the holders of one-twentieth of the shares outstanding. At any meeting, the holders of a majority of the entire number of shares may fill any vacancy existing in the number of trustees, may depose any or all of the trustees, and elect others in their places, may authorize the sale or mortgage of the property, or any part thereof, held by the said trustees, and may alter or amend this agreement or terminate the trusts hereunder. For all other purposes a majority of those shareholders present may decide on matters properly coming before them. Shareholders may vote by proxy, and for the purpose of voting at meetings each share shall be entitled to one vote. At any meeting five shareholders, or their proxies, representing one-fifth of all the shares outstanding, shall constitute a quorum.

It is manifest from these words that the shareholders have the ultimate control of all affairs of the trust. Since the trustees may be removed at any meeting of the shareholders; or the frame of the declaration of trust be altered; or the entire transaction terminated, and its affairs liquidated; the trustees are subject to the shareholders.

This type of arrangement constitutes a partnership among the shareholders, and any suit brought by shareholders will be settled upon the principles governing partnerships in this Commonwealth.

Gleason v. McKay, 134 Mass. 419 (1883)

This suit was brought by the treasurer of the Commonwealth against the trustee of the McKay Sewing Machine Association to recover a tax assessed upon the association. This tax was an excise upon some franchises or privileges sought to be held by the copartnership or association in supposed analogy to the franchises of corporations.

Mr. Chief Justice Morton held: The defendant in this case is not a corporation. It is merely a partnership, with all the incidents and responsibilities of a partnership. It enjoys no franchises conferred upon it by the legislature. It does not ask for or enjoy any corporate or special privileges. It has constituted its partnership under its common law rights and such legal agreements as it chooses to make. The peculiar feature, that the interest of each member may be transferred without the special assent of the other members, is created by agreement of the partners under their natural rights at common law.

The tax was held to be unconstitutional, since the organization was declared to be a partnership, and not a corporation.

Conclusion: The court held this organization to be a partnership, without discussing the reasons for this contention. This association came before the court in Hoadley v. County Commissioners of Essex, 105 Mass. 519, where the test for determining the legal status of an organization was applied. Followed in Williams v. Milton, 215 Mass. 1

Mayo v. Moritz, 151 Mass. 481 (1890)

Bill in equity, filed in the Superior Court against Joseph Moritz, John Fendel, William Fernekees and Charles Loeber, trustees of the Loeber Pneumatic Engine Company. Plaintiff assigned to these trustees his invention and his applications for letters patent therefor, to manage and dispose of the same in his discretion, and to divide the net avails between the inventor and the holders of scrip to be issued. The trustees accepted the trust, and issued scrip to themselves and to others, and contracted a debt for the purpose of the trust.

Judge Allen held: The deed of trust does not have the effect to make the scrip-holders partners. It does not contemplate the carrying on of a partnership business upon the joint account of the grantor and the scrip-holders, and in this respect the case is unlike Gleason v. McKay, 134 Mass. 419 and Phillips v. Blatchford, 137 Mass. 510. The scrip-holders are cestuis que trust, and are entitled to their share of the avails of the property when the same is sold.

If the trustees contracted a debt to the Plaintiff, they are liable for it personally, and an action at law may be maintained by him against them. In the present case, the Plaintiff seeks to have the whole trust property sold, and the proceeds applied to the payment of his single debt. But the invention is held in trust and is trust property.

Therefore the Plaintiff should ask for an amendment changing his proceeding into an action at law, if he is so advised, in the Superior Court.

Neal v. United States, 26 F. (2d) 708 (1928)

This is a petition to recover capital stock paid under protest by the petitioners, who are trustees of the First People's Trust, under a written declaration of trust, dated October 28, 1919.

The provisions of the trust agreement confer upon the shareholders no rights or powers other than to receive their proportionate share of the income, and of the assets in the event of liquidation. They have no power, individually or collectively, to elect or remove trustees, or to terminate or modify the trust. In this trust the beneficiaries have not even the power to assent to amendments. The shareholders have never held any meetings, or attempted, jointly or individually, to exercise any control whatever over the action of the trustees or over the affairs of the trust.

This trust came before the Supreme Judicial Court of the commonwealth of Massachusetts in the case of Bouchard v. First People's Trust, 253 Mass. 351, and it was there held that the trust was not a voluntary association. The court was of the opinion that the declaration of trust created an express trust, and not an association.

District Judge Brewster held in this case: Not only in the interest of uniformity, but in the belief that the distinction drawn between associations and express trusts is sound in principle, I am prepared to concur in the views expressed in Hornblower v. White, 21 F.(2d) 82, and in Bouchard v. First People's Trust, 253 Mass. 351. The government contends that the classification must be determined with reference to the purposes of the trust, or the nature and extent of the activities of the trustees carried on in pursuance of those purposes.

Neither Hecht v. Malley, 265 U. S. 144 or Burk-Waggoner Association v. Hopkins, 269 U. S. 110, support this contention. In the latter case, Mr. Justice Brandeis points out that the Burk-Waggoner Association is an unincorporated joint-stock association, like those described in Hecht v. Malley, supra, and these trusts were distinguished by Judge Lowell from the

Neal v. United States, 26 F. (2d) 708 (continued)

the trust before the court in the case of Hornblower v. White, supra. They are even more distinguishable from the trust in the case at bar.

Phillips v. Blatchford, 137 Mass. 510 (1884)

Bill in equity was filed against the surviving executor of the will of Marshall S. Scudder for contribution.

Certain persons entered into a copartnership styled The Ryder Reciprocal Grate Association, under a declaration of trust, by the terms of which no member, as such, was to have control over the business of the association, which was to be entirely under the control of a board of managers, of whom the trustee was to be a member, and the other members were to be elected by the shareholders.

The following provision was inserted in the declaration: The decease of a member of the association shall not work a dissolution of it, nor shall it entitle his legal representatives to an account, or to take any action in the courts or otherwise, against the association or the trustee, for such; but they shall simply succeed to the right of the deceased to the certificate and the shares it represents, subject to this declaration of trust.

Judge Oliver Wendell Holmes held: It is too late to contend that partnerships with transferable shares are illegal in this Commonwealth. They have been recognized as lawful by the court from Alvord v. Smith, 5 Pick. 232, to Gleason v. McKay, 134 Mass. 419.

If a partnership incurs debts, the members are personally liable, and there is no need of a paid-up capital. A man may contract with his copartners to indemnify them for a certain proportion of liabilities incurred after his death; and, if such liabilities are incurred, his executor will be bound de bonis testatoris in the same way that he is by any other contract of his executor, and without introducing any anomalous principle whatever. Ordinarily when a partner contracts that his share in the profits shall continue to a certain time, he contracts by implication that his liability for losses shall have the same

Phillips v. Blatchford, 137 Mass. 510 (continued)

duration. We see no reason why this principle should not apply when the time extends beyond the partner's life. And when, as here, a company is purposely made as nearly a corporation as possible, and it is obviously intended that the death of a shareholder shall not affect either the company or the rights incident to the share, we think that the liabilities go with the rights, and that the effect of the testator's contract was that he would share losses until his estate was relieved of his shares in the stock.

Conclusion: Judge Holmes did not discuss the legal status of this association. He stated that such an organization was a partnership, made as nearly a corporation as possible; and added an important principle of law, that in these partnerships with transferrable shares liabilities go with the rights, and that death does not affect these rights or liabilities.

State v. Lafferty, Harrison Common Pleas Court Ohio

No just government ever did, nor probably ever can, exist without an unwritten or common law. By the common law, is meant those maxims, principles, and forms of judicial proceedings, which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have by usage and custom, become interwoven with the written laws; and by such incorporation, form a part of the municipal code of each State or Nation, which has emerged from the loose and erratic habits of savage life, to civilization, order and a government of law.

As the laws of nature and reason are necessarily in force in every community of civilized men (because nature is the common parent, and reason the common guardian of man), so with communities as with individuals, the right of self-preservation is a right, paramount to the institution of written law; and hence the maxim, the safety of the people is the supreme law, needs not the sanction of a constitution or statute to give it validity and force, but it can not have validity and force, as law, unless the judicial tribunals have power to punish all such actions as directly tend to jeopardize that safety. The common law of England has always been the common law of the colonies and state of North America because when North America was colonized by emigrants who fled from the pressure of monarchs and priestcraft in the old world to enjoy freedom in the new, they brought with them the common law of England (their mother country), claiming it as their birthright and inheritance. From thence, through every stage of the colonial governments, the common law was in force, so far as it was found necessary or useful.

It may be concluded, that were the written laws wholly silent on a subject, the principles and maxims of the common law must, of necessity, by the rule and guide of judicial decision, to supply the defects of a necessarily imperfect legislation; and to prevent "the will of the judge, that law of tryants," being substituted in the room of known and settled rules of law in the administration of justice.

No just government ever did, nor probably ever can, exist without an unwritten or common law. By the common law, is meant those maxims, principles, and forms of judicial proceedings, which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have by usage and custom, become interwoven with the written laws; and by such incorporation, form a part of the municipal code of each State or nation, which has emerged from the loose and erratic habits of savage life, to civilization, order and a government of laws.

As the laws of nature and reason are necessarily in force in every community of civilized men (because nature is the common parent, and reason the common guardian of man), so with communities as with individuals. The right of self-preservation is a right, paramount to the institution of written law; and hence the maxim, the safety of the people is the supreme law, needs not the sanction of a constitution or statute to give it validity and force, but it can not have validity and force, as law, unless the judicial tribunals have power to punish all such actions as directly tend to jeopardize that safety. The common law of England has always been the common law of the colonies and State of North America because when North America was colonized by emigrants who fled from the pressure of monarchs and priestcraft in the old world to enjoy freedom in the new, they brought with them the common law of England (their mother country), claiming it as their birthright and inheritance. From thence, through every stage of the colonial governments, the common law was in force, so far as it was found necessary or useful.

It may be concluded, that were the written laws wholly silent on a subject, the principles and maxims of the common law must, of necessity, by the rule and guide of judicial decision, to supply the defects of a necessarily imperfect legislation; and to prevent "the will of the judge, that law of tyrants," being substituted in the place of known and settled rules of law in the administration of justice.

A statute which is clearly repugnant to the common law must be held as repealing it, for the last expression of the legislative will must prevail. When a new statute covers the whole ground occupied by a previous one, or by the common law, it repeals, by implication, the prior law.

* Copied verbatim from the opinion of the court in this case.

Williams & Others, Trustees, v. Inhabitants of Milton, 215 Mass. 1 (1914)

Four petitions for the abatement of taxes assessed upon the Plaintiff as trustees of the Boston Personal Property Trust. The Boston taxes were assessed on the theory that the property held by the Plaintiff under that trust was partnership property. The right to tax property as trust or as partnership property depends upon what the character of the property taxed really is. The principles on which this question of the true character of the Boston Personal Trust depends are:

(1) Where persons associate themselves together to carry on business for their mutual profit, they are none the less partners because their shares are represented by certificates which are transferrable and transmissible.

(2) As a matter of convenience the legal title to the partnership property is taken in the name of a third person.

Several such instances of partnerships in our reports are: Hoadley v. County Commissioners, 105 Mass. 519; Gleason v. McKay, 134 Mass. 419; Whitman v. Porter, 107 Mass. 522; Philips v. Blatchford, 137 Mass. 510; Ricker v. American Loan & Trust Co., 140 Mass. 346; Williams v. Boston, 208 Mass. 197.

(3) By the terms of this indenture the property contributed by the cestuis que trustent was to be held by the trustees in trust to pay the income to the holders of the certificates, and upon the termination of the trust to divide the trust fund among them.

(4) The cestuis que trustent are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. They may consent to an alteration or amendment of the trust or to a termination of it before the time fixed in the deed. They cannot force the trustees to make such alteration, amendment, or termination.

(5) Gains made by purchases and sales are profits of a partnership, divisible as such among those entitled to the profits of the partnership.

Williams v. Milton, 215 Mass. 1 (continued)

Gains made by a change of investments in a trust are an accretion belonging to the corpus of the trust fund, and belong to those who own the corpus of the fund.

(6) Therefore, since the property is the property of the trustees, to be managed by the trustees and not the cestuis, there is no association of or among the cestuis. The rights of the cestuis are limited to each receiving his share of the income of the trust investments during the continuance of the trust and his share of the corpus of the trust when the trust comes to an end.

This organization is in every respect an investment trust and not a partnership. Therefore, it follows that the property held by the Plaintiff, as trustee, was not taxable as partnership property.

Conclusion: The principles stated in this case reiterate those enunciated by Judge Morton in Hoadley v. County Commissioners of Essex, 105 Mass. 519, in 1870. There it was found that the association was a copartnership, despite the assertions in the declaration of trust to the contrary. In all these Massachusetts cases, the intention of the organizers is not the determining factor; the amount of control exercised by the shareholders is more important in determining the legal status of the organization.

Willis v. Commissioner of Internal Revenue, 58 F. (2d) 121 (1932)

Petitioners are trustees under an instrument of trust which declared the purposes of the trust to be acquisition, management, improvement, and disposition of trust property, and all other property acquired for the benefit of the beneficiaries. The trustees were given these broad powers: to fill vacancies caused by the retirement of any trustee; to borrow money; to use capital or income in the improvement of the property, or in the acquisition of other property.

The collection of the income tax from this trust is justified by the Commissioner under the claim that the trust organization, in form and in its practice is an "association" as that term is understood where used in the Revenue Act of 1924.

Simply stated, the question is, did the trustees manage and operate the property in their charge as a business, with the purpose to accumulate a profit by the use of it, or was their sole purpose, intended and pursued, to dispose of it as rapidly as possible and divide the proceeds among the beneficiaries? As a liquidating trust purely, the income would not be taxable; as a business venture, the income would be taxable. The distinction is made clear in Hecht v. Malley, 265 U. S. 144.

The question is to be determined from the facts showing what the trustees did in handling the property. The terms of the trust instrument are not conclusive, but they indicate the prupose in the minds of the beneficiaries, and are of significance when it is observed the the trustees assumed much of the power conferred upon them. Judged by their course of action as shown, it would be reasonable to assume that the trustees would continue to deal with the property in like manner as long as the trust remained alive. Such acts, as enumerated, gave to the trust operations the character of an active business enterprise. Therefore, the income would be taxable.

The Boston Personal Property Trust, Williams v. Milton, 215 Mass. 1

This Declaration of Trust, made this tenth day of January, in the year eighteen hundred and ninety-three, by John Quincy Adams of Quincy, Moses Williams of Brookline, William Minot, Jr. and Abbot Lawrence Lowell both of Boston, and Robert Sedgwick Minot of Manchester, all in the Commonwealth of Massachusetts (hereinafter called the Trustees,) witnesseth

Designation

First. That this trust shall be designated the "Boston Personal Property Trust."

1. TRUSTEES' DUTIES, POWERS AND LIABILITIES

Declaration, not a Partnership, Cestuis not Liable

Second. That the said Trustees shall hold all the funds and property (hereinafter called the trust fund), now or hereafter held by or paid to, or transferred or conveyed to them or their successors as Trustees hereunder in trust for the purposes, with the powers and subject to the limitations hereinafter declared, for the benefit of the cestuis que trustent, and it is hereby expressly declared that a trust, and not a partnership, is hereby created; that neither the trustees nor the cestuis que trustent shall ever be personally liable hereunder as partners or otherwise, but that for all debts the trustees shall be liable as such to the extent of the trust fund only. In all contracts or instruments creating liability, it shall be expressly stipulated that the cestuis que trustent shall not be liable.

PAYMENTS.

Third. In case any person proposes to pay by instalments, or at a future date, sums of money for interests in the trust fund, the trustees shall have full power and discretion to call such payments upon such terms and conditions as they see fit, and to receive the same either wholly or partly in cash, or in any property in which they are authorized to invest said fund.

POWER OF INVESTMENT, PERSONAL PROPERTY, GROUND RENTS

Fourth. (a) The Trustees shall have as full power and discretion, as if absolute owners, to invest and reinvest the trust fund (including any surplus and also income) in personal property, including bonds and notes or obligations secured upon real estate, and the decision of the Trustees as to what is personal property shall be final. They shall have the like power of investment in the purchase and improvement of real estate in the cities of the United States of America for the purposes of leasing the same upon long terms, or ground rents so called; and all real estate so purchased shall be conveyed to them in joint tenancy as Trustees hereunder.

POWER OF SALE

(b) The Trustees shall have full power and discretion to sell, transfer, and convey from time to time, at public or private sale any part or all of said trust fund, upon such terms and conditions as they see fit, and to invest the proceeds in the same manner, and upon the same terms as the original fund.

POWERS AS TO REAL ESTATE

(c) The Trustees shall have absolute control over and power to dispose of all real estate held by them at any time under this Trust, as if they were the absolute owners thereof, including the power to sell and convey, as above set forth, to improve, to lease or hire for improvement or otherwise, for a term beyond the possible termination of this trust, or for any less term, either with or without option of purchase, to let, to exchange, to release, and to partition.

POWER TO BORROW AND PLEDGE

(d) The Trustees may borrow money, for such time and upon such terms as they see fit, on mortgage of any real estate held by them hereunder, and may give mortgages therefor, either with or without power of sale, but never for more than sixty per cent. of the value in their judgment of the property mortgaged.

EXECUTION OF INSTRUMENTS

(f) The execution of all contracts, of all conveyances and transfers, and of all other instruments relating to the trust fund or any part thereof, by any three Trustees, shall always be sufficient. The acting Trustee or Actuary or Treasurer shall have full power to cancel and discharge mortgages by deed or otherwise, on the payment of satisfaction thereof.

PURCHASER, ETC., NOT LIABLE

(g) No purchaser, lender, corporation, association or officer or transfer agent thereof, dealing with the Trustees, shall be bound to make any inquiry concerning the validity of any sale, pledge, mortgage, loan, or purchase purporting to be made by the Trustees, or be liable for the application of money paid or loaned.

RECORDS, DEPOSITARY

Fifth. The Trustees shall constitute as their depositary such trust company in the city of Boston as they shall from time to time select, and hereby declare that they have selected for such Depositary the State Street Safe Deposit & Trust Company. Such Depositary shall have the custody of this declaration of trust, of any and all instruments altering or adding to the same, or terminating the trust, or containing the resignation of one or more Trustees, or appointing one or more Trustees to fill vacancies, or appointing a Trustee attorney for a co-trustee, or otherwise affecting affecting this declaration of trust, or the duties, powers, or liabilities of the Trustees. Such Depositary shall be bound to deliver on demand to any new Depositary selected by the Trustees, all such documents and records, and also to record, at the request of the trustees, any such document in any place of public record selected by them, whereupon the duty of such Depositary as to such recorded document, and its liability therefor hereunder shall cease, and it shall deliver to the Trustees all papers relating to the same. Copies of all documents and records in the custody of such Depositary, and certificates as to who are the Trustees, or cestuis que trustent, or the like, duly signed by the President, Treasurer, or

Actuary of such Depositary, shall be conclusive upon all questions as to title or affecting the rights of third persons, and in general shall have all the effect of their originals.

MANAGEMENT AND COMPENSATION

Sixth. The trustees may from time to time hire suitable offices for the transaction of the business of the Trust, appoint, remove, or reappoint such officers or agents (including a Depositary, and also agents to procure proposals for payments for interests herein) as they may think best, define their duties, and fix their compensation. The compensation of the Trustees shall not at any time exceed five per cent. of the gross income of the Trust Fund, and one per cent. of the amount distributed or conveyed upon final distribution or conveyance.

DIVIDENDS, SURPLUS

Seventh. The Trustees shall declare dividends from the net income of the Trust Fund among the cestuis que trustent quarterly, or oftener, if convenient to the Trustees, and their decision as to the amount of dividend, and as to using therefor any portion of the surplus fund, shall be final. They may set aside from time to time such portion of the net income as shall not be required for dividends for a surplus fund.

POWER TO DECIDE BETWEEN INCOME AND CAPITAL

Eighth. The Trustees may charge all brokers' and agents' commissions to Income or Capital, as they see fit. They shall have the right to treat as income such portion of the price of stock bought or sold between dividend days as fairly represents accrued dividends reckoned by way of interest, but never at a higher rate than six per cent. per annum on the price paid or received. In general their decision as to what constitutes Capital or Income, or shall be credited or debited to Capital or Income, shall be final.

ANNUAL ACCOUNT

Ninth. The Trustees shall render an account annually or oftener, if convenient to them, and shall, upon request, deliver or mail a copy to each cestui que trust.

RESIGNATION, VACANCY, NEW APPOINTMENT, TEMPORARY ABSENCE, POWER OF ATTORNEY

Tenth. Any Trustee may resign his trust by a written instrument signed and sealed by him, and acknowledged in the manner prescribed for the acknowledgment of deeds, and such instrument may be recorded in the Registry of Deeds for the County of Suffolk, or deposited with such Depositary as the Trustees shall from time to time select.

Any vacancy occurring from any cause at any time in the number of said Trustees shall be filled by the remaining Trustees. Until such vacancy is filled, or while any Trustee is absent from the Commonwealth of Massachusetts, or physically or mentally incapable, by reason of disease or otherwise, the other Trustees shall have all the powers hereunder, and the certificate of the other Trustees of such vacancy, absence or incapacity shall be conclusive. In case of such vacancy or if appointment of a new Trustee or Trustees, the Trust Fund shall immediately vest in the remaining Trustees or in the new Trustee or Trustees, jointly with the remaining Trustees, as the case may be. Any Trustee may, by power of attorney delegate his powers, for a period not exceeding six months at any one time, to any other Trustee or Trustees hereunder, provided that in no case shall less than three Trustees personally exercise the other powers hereunder (except in case of discharge of mortgages, as hereinbefore provided).

The term "Trustees" used in this agreement shall be deemed to mean those who are or may be Trustees for the time being.

TRUSTEES' LIABILITY, NO BOND REQUIRED

Eleventh. Each Trustee shall be responsible only for his own willful and corrupt breach of trust, and not for any honest error of judgment, and not for one another. No Trustee shall be required to give a bond.

2. RIGHTS AND LIABILITIES OF CESTUIS QUE TRUSTENT

NOTICES

Twelfth. Notices delivered personally, or mailed with prepayment of postage seven days beforehand to any cestui que trust, or to his attorney duly designated for the purpose, at the residence stated by him or in the certificate, or to the address given by him or them from time to time to the Trustees, shall be binding.

FORFEITURE OF PAYMENTS

Thirteenth. In case any cestui que trust neglects to pay any instalment within the time specified in the call therefor, the Trustees may, if they see fit, declare any amount of his previous payment or payments to be forfeited.

CERTIFICATES, CONVERTIBLE SCRIPT, LOST CERTIFICATES

Fourteenth. The Trustees shall issue a certificate, in such form as they shall deem best, to each person who shall pay the sum of one thousand dollars or multiple thereof, for an interest in the Trust Fund. But no certificate shall be issued for any less sum than one thousand dollars, at par value. The Trustees may also from time to time, if they see fit, issue scrip of the par value of one hundred dollars or multiples thereof, convertible into certificates in sums of one thousand dollars or multiples thereof, and bearing interest, and on such other terms and conditions as they shall deem best.

In case of the loss or destruction of a certificate or script, the Trustees may issue a duplicate thereof, on such terms as they deem proper.

TRANSFER OF CERTIFICATES

Fifteenth. The interests represented by the certificates may be transferred on the books of the Trustees by the person named therein, or his legal representative, upon the surrender of the certificate, and a new certificate shall be issued to the transferee, who shall thereupon become

a cestui que trust. But no such interest shall be sold until the holder thereof (including assignees in insolvency or bankruptcy, or for benefit of creditors and holdersby process of law or otherwise, except as hereinafter stated) shall have first in writing offered it for sale to the Trustees, who shall, as such Trustees, have the option for ten days after the receipt of such offer of buying the same at not more than the last preceding appraisal made by them, such appraisal to be made annually or oftener as they shall deem best. Interests so purchased by the Trustees may be held as part of the Trust Fund, or sold by them at their discretion.

Devises by will, distribution of the assets of deceased persons according to law, and distribution of trust funds among those entitled thereto, upon the termination of the trust, shall not be deemed sales for the purposes hereof.

NO ASSESSMENT OR PERSONAL LIABILITY

Sixteenth. No assessment shall ever be made upon the cestuis que trustent, nor shall they ever be personally liable in any event, or have any rights hereunder except as herein defined.

BOOKS OPEN TO INSPECTION

Seventeenth. The books of the Trustees shall always be open to the inspection of the cestuis que trustent.

INCREASE OF CAPITAL, RIGHTS

Eighteenth. The Trustees may from time to time, at their discretion, invite and receive payments for interests in the Trust Fund in cash or in property, as hereinbefore provided, for the purpose of increasing the capital of the Trust Fund, giving preference, if they see fit, upon such terms and conditions as they shall deem best, to existing cestuis que trustent. All payments shall be subject to the terms of this Declaration of Trust.

3. DURATION AND TERMINATION OF TRUST

Nineteenth. At and upon the expiration of twenty years after the death of the last survivor of the following-named persons:-

Walter Abbott, sone of John Abbott of Boston;
George C. Adams, son of John Quincy Adams of Quincy;
Oliver Ames, son of Frederick L. Ames of Easton;
F. Reginald Bangs, son of Edward Bangs of Wareham;
Boylston A. Beal, son of James H. Beal of Boston;
Robert P. Blake, son of S. Parkman Blake of Boston;
Causten Browne, Jr., son of Causten Browne of Boston;
Edmund D. Codman, son of Robert Codman of Boston;
David H. Coolidge, Jr., son of David H. Coolidge of Boston;
Philip Dexter, son of William S. Dexter of Boston;
John M. Howells, son of William D. Howells of Boston;
Lawrence Minot, son of William Minot of Boston;
William Minot, 3rd, son of William Minot, Jr., of Boston;
James Otis Potter, son of Alexander S. Potter of Beverly;
Abbott Lawrence Rotch, son of Benjamin S. Rotch, late of Milton;
James J. Storrow, Jr., son of James J. Storrow of Boston;
Samuel Wells, Jr., son of Samuel Wells of Boston;
George Putnam, son of William L. Putnam of Boston;
Gladys Williams, daughter of Moses Williams of Brookline;
Robert S. Minot, Jr., son of Robert S. Minot of Manchester;

or at such earlier time as hereinafter provided, the Trustees shall terminate this trust by dividing the Trust Fund, or the proceeds thereof, among the cestuis que trustent, being first duly indemnified for any outstanding obligation or liability, and shall thereupon be forthwith discharged.

ALTERATION OF TRUST, TERMINATION OF TRUST, CONVEYANCE OF TRUST FUND

Twentieth. The trustees may, with the consent of the three-fourths in interest of the cestuis que trustent, alter or add to this declaration, or terminate this trust, and if it seems to them judicious so to do, they may with like consent, convey the Trust Fund to new or other Trustees, or to a corporation, being first duly indemnified for any outstanding obligations or liabilities. The instrument setting forth such alteration, addition, termination, or conveyance shall be signed by at least three of the Trustees and recorded in said Registry of Deeds, or deposited with such Depositary as the Trustees shall select. Such instruments shall be conclusive of the existence of all facts and of compliance with all pre-

requisites necessary to the validity of such alteration, addition, termination, or conveyance, whether stated in such instrument or not, upon all questions as to title or affecting the rights of third persons.

Provided, however, and it is especially declared that the Trustees shall be under no obligation to terminate this Trust or convey the Trust Fund, except as hereinbefore provided.

IN TESTIMONIUM

Twenty-first. In Witness Whereof, the said Trustees have hereunto set their hands and seals the day and year above written in duplicate.

Signed and sealed in presence of

Signed Charles H. Shriver
(Seal)

Signed (John Quincy Adams (Seal)
(Moses Williams (Seal)
(William Minot, Junior (Seal)
(A. Lawrence Lowell (Seal)
(Robert S. Minot (Seal)

Commonwealth of Massachusetts) ss:
Suffolk)

Boston, January 14, 1895.

Then personally appeared the above named John Quincy Adams, Moses Williams, William Minot, Junior, A. Lawrence Lowell, Robert S. Minot, and asknowledged the foregoing instrument to be their free act and deed.

Before me,

Signed Charles H. Shriver, Notary Public.

A true copy of the original on file with this Company.

State Street Trust Company,

A. L. Carr, Treasurer.

Common Law

"The Common law of Massachusetts, then, properly embraces, in the first place, that portion of the common law of England, (as modified and ameliorated by English statutes,) which was in force at the time of the emigration of our ancestors, and was applicable to the situation of the colony, and has since been recognized and acted upon, during the successive progresses of our Colonial, Provincial, and State Governments, with this additional qualification, that it has not been altered, repealed or modified by any of our own subsequent legislation now in force. In the next place, it embraces those local usages and principles, which have the authority of law, but which are not founded upon any local statutes. The latter, indeed, are so few, and comparatively, in a general sense, so important, that they may, for all our present purposes, be passed over without farther observation or notice.

"The next inquiry is, what is the true nature or character of the common law, so recognized and established, and where are its doctrines and principles to be found. In relation to the former part of the inquiry, it may be generally stated, that the common law consists of positive rules and remedies, of general usages and customs, and of elementary principles, and the developments or applications of them, which cannot be distinctly traced back to any statutory enactments, but which rest for this authority upon the common recognition, consent and use of the State itself. Some of these rules, usages and principles are of such high antiquity, that the time cannot be assigned, when they had not an existence and use.

In truth, the common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form, which fall within the letter of the language, in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country. There are certain fundamental

maxims in it, which are never departed from; there are others again, which, though true in a general sense, are at the same time susceptible of modification and exceptions, to prevent them from doing manifest wrong and injury. When a case, not affected by any statute, arises in any of our courts of justice; and the facts are established, the first question is, whether there is any clear and unequivocal principle of the common law, which directly and immediately governs it, and fixes the rights of the parties. If there be no such principle, the next question is, whether there is any principle of the common law, which, by analogy, or parity or reasoning, ought to govern it. If neither of these sources furnishes a positive solution of the controversy, resort is next had (as in a case confessedly new) to the principles of natural justice which constitute the basis of the common law; and if these principles can be ascertained to apply in a full and determinate manner to all the circumstances, they are adopted, and decide the rights of the parties."

Copied verbatim from the report on the Codification of the Common Law submitted to his Excellency The Governor, January 15, 1837. Joseph Story was chairman of this committee, and this part of the report was written by him. See "Miscellaneous Writings" of Joseph Story, edited by his son, William Story.